

DOCUMENT RESUME

ED 244 321

EA 016 748

AUTHOR Jones, Thomas N., Ed.; Semler, Darel P., Ed.
TITLE School Law Update...Preventive School Law.
INSTITUTION National Organization on Legal Problems of Education,
Topeka, Kans.
PUB DATE 84
NOTE 196p.; For individual chapters, see EA 016
749-763.
AVAILABLE FROM Publications, National Organization on Legal Problems
of Education, 3601 Southwest 29th Street, Suite 223,
Topeka, KS 66614 (\$17.95 plus \$1.50 postage and
handling).
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Books
(010) -- Collected Works - General (020)
EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Accountability; Civil Rights; *Compliance (Legal);
Constitutional Law; *Court Litigation; Due Process;
Educational Legislation; Educational Malpractice;
Elementary Secondary Education; Equal Protection;
Federal Legislation; Government School Relationship;
Insurance; Lawyers; *Legal Problems; *Legal
Responsibility; Models; Politics of Education; Public
Relations; School Desegregation; *School Law; State
Legislation; Torts

ABSTRACT

A wide variety of contemporary legal issues are addressed in the 15 separate papers that make up this volume. The introductory chapter by William C. Bednar, Jr. provides a broad-based rationale for "Preventive School Law." Chapters 2 and 3, both by Gerald A. Caplan, review "Current Issues in Reduction-in-Force" and "First Amendment Claims by Public Employees." Chapter 4, by Everett E. Nicholas, Jr., provides comprehensive coverage of recent developments in "Group Insurance, Bond Issuance, and Annuity Programs." Chapter 5, by Eric S. Mondschein, addresses "Legal Responsibility of Educators in Child Abuse." Chapter 6, "Private Schools' Tax Exempt Status and Application of Section 1983," by Ralph D. Mawdsley and Steve Permuth, addresses the conflict between pluralistic education and students' constitutional rights. Chapter 7, "Shall We Pray? The Latest Word from Legislatures and Courts," by Gail P. Sorenson, reviews current legislative and judicial activities on the school prayer issue. In chapter 8, Arlene H. Patterson tells "How to Avoid an Educational Malpractice Suit." Chapter 9, by M. Chester Nolte, provides a model for conducting "Empirical Research on Education Law Issues," while chapter 10, by Nelda H. Cambron-McCabe, reviews "The Changing School Finance Scene: Local, State, and Federal Issues." Chapter 11, by Kristin Olson, reviews "Legal Issues in Asbestos Litigation," while chapters 12 through 14 review civil rights issues: "Seniority Rights and Title VII" by Martha M. McCarthy, "Beyond the Title VII Framework: Racial Quotas and Teacher Employment Policies in School Desegregation Litigation" by Monique Weston Clague, and "Cultural Bias in Special Education Assessment and Placement" by Ernest Rose and Dixie S. Huefner. Chapter 15, by Paul D. Kemp, concludes the volume, advocating a strong "Role of Public Relations in Preventive School Law." (TE)

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School Law Update... Preventive School Law

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EA 016 748

NOLPE

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3601 Southwest 29th Street
Topeka, Kansas

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The opinions expressed in the papers published in *School Law Update . . . Preventive School Law* are solely those of the authors, and do not represent any policy determination of the National Organization on Legal Problems of Education.

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Preventive School Law

WILLIAM C. BEDNAR, JR.

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At the outset one might ask why school people should be concerned with preventive law? After all, if there is nothing to prevent the true sorehead from finding a lawyer, paying the filing fee, and forcing one to his defenses in court, why pay good money to your own lawyer until the summons arrives? Lawyers insist on charging high hourly fees. Why not wait until the last possible hour to turn on their meters?

There are some obvious answers and some less obvious answers to those who would advance such arguments. Consider first the question of cost. It is a fairly obvious proposition that in most situations it costs less to avoid trouble than it does to get out of trouble. As a matter of direct cost, which is that of simply setting things right, it is plainly less expensive, for example, to pay for a survey and abstract of title than it is to move or alter a million-dollar school building built three feet over a property line. In addition to direct costs, there are less obvious indirect costs. Correcting errors nearly always consumes time, disrupts plans, and frays tempers. All too often, it also destroys valuable relationships and diminishes the quality of education. These are factors which are less capable of precise calculation, but whose detrimental impact on the schools may be far greater than the direct costs. How many of us who have dealt with some aspect of school desegregation would have rather done the same thing our way, rather than the plaintiff's way, the government's way, or the federal judge's way? How much did it cost to do it their way?

Now, this is not to say that prevention of legal trouble is not without its own costs. But the difference between the cost of prevention and the cost of cure is that, in most situations and with reasonable accuracy, the cost of preventing legal problems can be predetermined whereas

the cost of cure cannot. A school district can plan how and when it will engage in a program or activity, for example, a girl's athletic program, and roughly what it will cost for materials, human resources, and legal advice. But suppose the legal advice is foregone, and some foreseeable ingredient detrimental to the lawfulness of the program turns up, such as an element of sex discrimination in violation of Title IX? Without preventive legal advice, one may not even realize that the problem exists. But even with a grasp of the problem, one cannot easily predict the form in which it will be presented or when it will arise. Will it be when the United States Office of Civil Rights arrives for a routine compliance review? When a student files a private suit? When the school district requests and is denied federal funding? Will any of these things occur soon? A year from now? Two or three years?

Control of costs is not the only advantage of preventive legal planning. Being named a defendant in a lawsuit is always one of the risks we run in our litigious society, and education institutions, as all of us here know, are particularly susceptible to lawsuits. But even in the face of litigation, preventive legal planning tends to decrease the likelihood of a lawsuit actually being filed, rather than merely threatened, and gives better assurance of a good defense if a lawsuit is filed.

The importance of discouraging litigation has been obvious to school law veterans for years, and cannot be overemphasized here in 1983, a year, for example, in which the Fifth Circuit Court of Appeals has held that attorneys' fees *are* available to a prevailing plaintiff in a suit to enforce P. L. 94-142 if that plaintiff has taken pains to state a federal constitutional claim as well as a statutory claim under the act, and has intimated that attorneys' fees for state administrative proceedings may also be awarded.¹ And if a suit is per chance filed for punitive damages under section 1983, one will yearn for a carefully anticipated and prepared defense in view of *Smith v. Wade*,² decided last April, in which the Supreme Court of the United States did away with actual malice as an indispensable element of proof and held that a jury may assess punitive damages solely upon a showing a reckless or callous indifference to the federally protected rights of others. That alone is reason enough not to be reckless or callously indifferent to those who possess the ability to haul us into the courthouse. To the contrary, to the extent that human behavior and the law are themselves reasonably predictably, we can through foresight predict legal risks and minimize their scope, and, even in those areas where the law is less certain, as is

1. *Espino v. Basteiro*, 708 F.2d 1002 (5th Cir. 1983).

2. 103 S. Ct. 1625 (1983).

perhaps more frequently the case in a school practice, we can at least evaluate the risks and choose courses of action that are less risky than others.

That brings us to the purpose of this chapter, which is to suggest the outlines of a preventive school law practice, raise issues, and provoke further thought and discussion concerning the application of preventive law principles and techniques to the management and operation of educational systems. The theory of preventive law and some of its premises will be examined, in order to arrive at a working idea of the term "preventive law," as well as the implications preventive law may have for the anticipation and resolution of legal problems commonly encountered in schools and school systems. The somewhat different roles to be performed by attorneys, administrators, school law professors, and other professionals will also be considered, with particular attention to the attorney-client relationship, which lies at the heart of any program of preventive law.

It is the purpose throughout, however, to raise more questions than answers, and thereby to encourage and stimulate not only individual preventive law strategies but also a role for NOLPE in fostering and improving preventive law among its membership and providing preventive law resources to other interested groups and persons.

There is not extensive literature on the subject of preventive law. The *Index to Legal Periodicals* does not even include preventive law as a subject heading. Neither does the card catalog of the University of Texas Law Library. Consequently, for some of the ideas already expressed and for much of what is to come in the way of theory and techniques, the author is greatly indebted to Louis M. Brown, Professor of Law emeritus at the University of Southern California, and Edward A. Dauer, Associate Dean and Associate Professor of Law at Yale Law School, who have co-authored an article recently appearing in three parts in the *Preventive Law Reporter*.³ Professor Brown is a major proponent of preventive law as a coherent discipline, and in 1950 he authored a very useful treatise which has also been a rich source of ideas for this chapter.⁴

There are several helpful distinctions to be drawn between preventive law and the more curative approach usually taken by lawyers and clients faced with resolving a dispute or a problem that has already occurred. Indeed it is the chronological element that provides the most

3. L. Brown & E. Dauer, *A Synopsis of the Theory and Practice of Preventive Law* (in three parts), 1 PREVENTIVE LAW REP. No. 1 at 6-9 (July 1982), No. 2 at 5-8 (Oct. 1982), No. 3 at 6-13 (Jan. 1983) [hereinafter cited as Brown & Dauer.]

4. L. BROWN, *MANUAL OF PREVENTIVE LAW* (Prentice-Hall 1950), reprinted as PREVENTIVE LAW (Greenwood-Press 1970).

universally distinguishing characteristic between a preventive law problem and a curative law problem. As Brown and Dauer put it:

Dispute-centered representation—advocacy—focuses largely if not exclusively on things that have already happened. Preventive lawyering is concerned largely if not exclusively with things that might happen in the future. From the client's point of view advocacy is necessary to correct an undesired problem that has already occurred; planning is useful to structure the future in some desired and optional way.⁵

Another distinction is in the allocation of decisionmaking between lawyer and client. In litigation, the client is generally regarded as the one who determines the goals to be achieved and allocates the responsibility between lawyer and client in pursuing them, while the lawyer decides upon the means of achieving the goals set forth by the client. But in the preventive practice, objectives and means may be indistinguishable, and the decisionmaking aspects of the lawyer-client relationship more complex.

By way of illustration, consider the public school teacher who wants to do something about the fact that he has been fired for incompetence. This is a curative situation in which most of the operative facts have already occurred. The teacher has or has not taught competently. His performance evaluations and other performance-related memoranda are, or are not, already in the files and they are, or are not, accurate. The decision to terminate has already been made, and the administration's witnesses are waiting in the wings. The client has suffered an undesirable result, being fired, and he now wants either to be compensated in damages for the harm done to him, or to have the injury redressed through an injunction reinstating him.

Now, there may be many complex motivations behind this client's decision to go to a lawyer rather than walking away from the problem, but ordinarily the lawyer will take the stated objectives—to win damages or an injunction—at face value, just as the school's lawyer will usually take at face value the administration's stated objective of avoiding damages or an injunction.

But in the preventive practice, the client's objectives more often should be seen as means for achieving more basic underlying purposes, and less often should be taken at face value by the lawyer. Suppose another teacher comes to her lawyer, but this time right after the receipt of her first adverse performance memorandum, and states that she wants an injunction expunging the memorandum from her file. As

5. Brown & Dauer, *supra* n.3, Part 1 at 7.

a legal matter, such an injunction may or may not be difficult to obtain, but the preventive law question is whether such an injunction is really the client's purpose. When the teacher asks "How do I get an injunction to get that memo out of my file," the question can be seen not as a question but as a solution to an underlying purpose, which may be to repair a relationship with the principal, or perhaps to avoid being dismissed. But even these formulations of the objective may be seen as only one of several solutions to yet another purpose even more deeply seated—to be a competent and well-regarded teacher rather than an incompetent and ill-regarded one. Does the teacher have a good or a bad working relationship with the principal who papered her file? Does the teacher want to continue working in this school or school system, or not? Will a transfer and a fresh start achieve the same purpose with less adverse side effects? If not, what measures can the teacher take to correct deficiencies and improve her performance evaluation? Would that be cheaper and better than a lawsuit?

Much the same analysis, of course, can be applied in the opposite situation, where the superintendent comes into the lawyer's office and announces that he wants to initiate dismissal proceedings to fire a teacher. His purpose may really be simply to get rid of the teacher, for which a dismissal proceeding would be but one possible solution. What about a transfer or resignation? Or perhaps what he really wants is the same thing that our teacher in the previous example wanted—competent performance on the job—which would call for still a different approach.

The point is, that in the preventive practice the lawyer is called upon to be sensitive to the total personal or institutional context in which the client is raising the problem and to the basic motivations that may be involved. In litigation, a judgment is entered for or against the client, which is an objective outcome that usually ends the matter. But preventive legal counseling results in an arrangement that projects into the future, where the clients may be well-served or ill-served depending on the depth and thoroughness of the lawyer and the client in focusing on the decisions to be made.

Moreover, in the preventive practice lawyer and client are usually faced with an admixture of legal and extralegal judgments. Whether a given set of facts, presented in a particular type of lawsuit, will yield a win or a loss at the courthouse is a matter of legal prediction, which lies principally in the domain of the lawyer's judgment. But whether the particular transaction or relationship being fashioned by policy, contract, and conduct in the operation of a school will satisfy the many institutional and personal objectives to be obtained requires not only predictions of law, but also predictions of fact, which need to be clearly

identified as such and explicitly allocated between lawyer and client during the process of consultation.

Yet another distinction between litigation and the preventive practice is the extent and variety of choices, which are far broader in the preventive realm. In the courthouse, most of the procedural rules are established and controlled by a third party—the court. In preventive law, there is no court and the only rules are those of the lawyer's best judgment in light of the client's purpose, which we have seen can be highly variable depending on the depth of the analysis. Once an event has happened, the law applicable to it is more or less certain. But the preventive practice focuses on planning, which is in a sense creating facts that will exist in the future. If we are not satisfied with the legal result that would flow from one set of facts, we may be free within surprisingly broad limits to draft our board policies, our school rules, our administrative directives, and our contracts, or to make antecedent decisions regarding student discipline, library books, religious holidays, and the other myriad things entailed in running a school system, in such a way as to yield an entirely different set of facts when a point of legal dispute is eventually reached.

Finally, in this overview of the theory of preventive law, there are those decisions calling for legal judgment that have irreversible consequences for the client. These occur in litigation, as where a co-defendant is or is not to be joined or a cause of action pleaded or not pleaded within the required time, but once framed and presented at trial, the disputed issues are decided by a judge or jury, from whose decision there are avenues for appellate review. But in the realm of planning, the law of the client's future is more often decided by the lawyer alone and, once the client is committed to a course of action through enactment of a policy or execution of a contract, the decisions may be irrevocable. Policies can be changed, but this will be to no avail if third parties have acted pursuant or contrary to them. Contracts can be amended, but not unilaterally. A collective bargaining contract lives on forever.

Given the importance of the legal planning process, what are its techniques? From the lawyer's point of view, the first will be to perform, with one important difference, essentially the same task of legal analysis as would be performed in a curative situation, which is to discover what substantive legal rules bear on the client's purpose, *i.e.*, what facts will, under the law, yield what results? The important difference is that the facts have not yet happened, and the task is to create, in the present, those facts in the future that will produce legal results consistent with the outcome desired by the client. The lawyer accomplishes this by creating institutional and transactional structures,

drafting documents, and influencing client behavior, according to a plan devised in cooperation with the client and measured and revised against the client's capabilities and other interests. The entire matter is thought through from beginning to end, considering what events might possibly affect the ultimate purpose, and the plan is accommodated to these possibilities so as to leave the purpose unimpaired. Consideration is also given to future stages of the client's own conduct once the immediate purpose is accomplished, and provision is made, to the extent possible or foreseeable, for the contingencies that may be presented. Then the plan is reviewed for effectiveness as it unfolds, either when predetermined decision points arrive or when unforeseen events occur.

Finally, preventive law includes the separate technique of the "legal checkup" or "legal audit." The client should not necessarily be charged with all of the responsibility for recognizing specific problems or purposes that call for the sort of preventive analysis we have been describing. To quote a medical analogy from professors Brown and Dauer:

[M]ost people can recognize a broken arm. Few can monitor their serum triglycerides and many don't even know that they should. It is therefore the profession's obligation to suggest, to make available, and to analyze the lab work on some periodic basis. A *checkup* is a regular part of preventive professional care; the utility of professional service is not limited to treating the client who arrives, fortuitously, with a broken arm.⁶

With regard to both individuals and organizations, the concept of preventive law includes as an important element the checkup or legal audit, in which the client's legal facts are ascertained and analyzed for legal problems, and appropriate legal measures are applied.

Even though the main thrust of preventive law is to avoid litigation, there are also preventive techniques that can be utilized once a lawsuit is filed both to control litigation costs and to achieve desired results. The overall objective in each case is to determine the best economics in dollars and time to achieve the desired result, which again calls for frank and friendly cooperation and communication between lawyer and client and a thorough and candid analysis of the client's purposes. What overall value in dollars, if any, can be placed on the case? Can a litigation budget be worked out? Can lawyer and client agree in advance on the amount and type of discovery to be conducted? Are there technological resources in the client's office that can benefit the lawyer's preparation for trial and vice-versa? What about investigation of facts and gathering of documentary evidence, and the preparation

6. *Id.*, Part 3 at 5.

of witnesses? If the litigation has major systemwide implications, as in the case of a desegregation suit, should some form of lawyer-client task organization be fashioned to provide stability, consistency, and continuity of effort? A lawsuit may begin under one set of assumptions and purposes, but be subject to entirely different ones by the time it reaches final judgment several years later, owing to the different composition of its board of trustees or administration. What protocols between lawyer and client would provide a history of their communications as a point of reference for evaluating and accommodating shifts in the client's attitude toward the case? All of these questions suggest that a preventive law approach need not be abandoned upon the filing of a lawsuit, but may instead be profitably employed to curb costs, prepare effectively for trial, and maintain a consistent overall perspective on litigated cases.⁷

Given the manifold advantages of legal planning, we might well ask why there has not been a more comprehensive and disciplined approach to preventive law in the field of school law. This does not mean to imply that preventive law has not been one of NOLPE's concerns up to now, nor that preventive law is not being practiced within the NOLPE membership. Indeed, all of the NOLPE publications are preventive devices in the sense that they help identify the legal rules that govern the planning process, and many of them are overtly preventive in approach.⁸ And surely there are those of our membership who regularly and purposefully practice preventive law. Still, preventive law has not reached the level of sophistication in the school law practice that it has in areas of the law that have lended themselves more readily to transactional planning, such as business and commercial law, wills and estates, property and trusts, and state and federal taxation.

Until recently, this might have been explained on the basis that the school practice is a relatively new area of the law, in which settled legal rules have not yet emerged. Rules of law are employed in the planning process in order to know, with a given purpose in mind, what facts must be created in the future to yield legal results necessary to or consistent with that purpose. This process is less precise, and therefore less fruitful, where the legal rules themselves are unsettled. But then we must ask, in how many areas of the school practice are the rules really unsettled anymore? Certainly not in the matter of due process for

7. See generally, M. Haring, *Perspectives on Litigation Cost Control*, 55 N.Y. St. B.J. 6 (May 1983).

8. E.g., K. Frels & T. Cooper, *A DOCUMENTATION SYSTEM FOR TEACHER IMPROVEMENT OR TERMINATION* (NOLPE Memo-Monograph 1982); R. Phay, *REDUCATION IN FORCE: LEGAL ISSUES AND RECOMMENDED POLICY* (NOLPE Monograph 1980).

teachers and students. The rules there have been clear for years. And what of the many transactions in which a school system or educational institution stands in essentially the same shoes as any other business client, as in the purchase or sale of real property, or the defense of a vehicle accident claim? It would appear that preventive law concepts would have great and immediate utility in many areas of the school practice if only we would pause, think, and utilize them.

The thought of pausing and thinking, however, suggests another reason why preventive law has not received more emphasis in school settings. Most schools and school systems, at all levels, are public agencies whose limited fiscal and legal resources have tended by design or by default to be absorbed by crises, such as litigation, administrative hearings, federal compliance reviews, telephone calls from anxious administrators with on-site problems, and the press of routine school business having legal implications. But perhaps the time has come to pause and think through what advantages can be gained in allocating some portion of our resources specifically to a preventive law program.

Certainly we are in an age in which growing distrust of governmental authority generally is leading to increasing legalization of the relationships among administrators, teaching faculty, students, parents, and taxpayers. What has emerged is an emphasis on legal process as a means of achieving accountability for public decisions. In the schools, disputes that once might have been resolved informally on the basis of cooperation and mutual trust, are now subject to court-like procedures and rules designed to curb the discretion of school officials to make autonomous decisions. The educational community has not been unresponsive to these trends. School administrators, with an eye toward reinforcing their version of facts, have become more meticulous and circumspect in their own procedures and record keeping. Informal decisionmaking has tended to become decentralized as school administrators, with an eye toward escaping personal liability, consult more frequently with parents, teachers, lawyers, and governing boards in order to spread responsibility and "institutionalize" their decisions. Decisions are more often delegated to the parents or students themselves, in the form of signed authorizations for particular programs, activities, or administrative actions. Hearings are routinely offered and held. The language of court decisions more often appears in written communications and official records.⁹ In an instinctive sort of way, many school people and their lawyers are practicing a form of preventive law already.

9. See, M. Yudof, *Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools*, WIS. L. REV. 891 (1981).

But in our concern with whether a "case" is "winnable" and not whether the best interest of the school, student, or employee is served, perhaps the legalization of our schools has gone too far. As Grant Gilmore has said:

Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.¹⁰

Or as Professor Yudof has asked, are we now excessively committed to "a formalism in which procedure is deified at the expense of education?"¹¹

Preventive law, in which we predict not only what courts and other tribunals are likely to do, but also how *people* are likely to feel injured, and how they will behave, may afford us a means of extricating ourselves from these complexities. The possibilities exceed by far the scope of this chapter, but here are a few ideas to provide some starting points.

Certainly in those areas of the school practice where the educational entity is engaged in purely proprietary transactions the principles of preventive law can be immediately put to good use. For example, there is much to be concerned about in purchasing computer systems. Has the vendor's proposal been incorporated into the contract? How about the specifications? Can a portion of the purchase price be withheld pending installation and acceptance? Does the contract contain an objective test by which the acceptability of the system can be judged? Is there a "drop dead" date upon which the purchaser can walk away from the transaction if the vendor has not been able to make the system work? Who bears the risk of loss of the equipment and software prior to acceptance by the purchaser? What warranties are offered, and are they adequate? These, and other questions relating to maintenance, training and software support, software updates, remedies for vendor's failure to perform, assignability of the contract, and other things are all matters that have important operational consequences once the contract is in place, and they are matters which, in today's competitive computer market, are subject to negotiation with computer manufacturers, consultants, and retailers.¹² This is, of course, but one example of the many sorts

10. G. GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977).

11. M. Yudof, *supra* n.9, at 919.

12. See, C. Kruger, *Representing the Purchaser of a Computer System: A Checklist of Major Contract Issues*, 1 PREVENTIVE LAW REP. No. 3 at 4 (Jan. 1983).

of transactions in which an educational institution is in much the same position as any other business client, and in which preventive legal planning can offer highly cost-effective benefits.

But educational institutions are, in the great majority of instances, also state or local governmental bodies, and much of their collective and individual conduct results from the implementation of policies and rules. Here, too, there are opportunities to save much trouble and grief through preventive legal planning. A preventive legal analysis directed at new educational programs or activities might first ask whether the proposed policy will cause injury. To whom? How? Will the injury, if any, be educational? Occupational? Psychological? Is there the prospect of bodily harm? Will there be disproportionate effects among protected minority groups? What procedures and lines of communication will yield good answers to these questions? Once information of this sort has been gathered, it can be evaluated from the legal standpoint and the policy issues thus raised debated and resolved. The line between policy options and legal requirements can be clarified, and points of legal vulnerability can be shored up through appropriate amendments.¹³

School policies, of course, have a profound impact upon practically every aspect of a school's educational functioning. They constitute the organic law of the institution, and touch upon practically every area in which legal challenge or litigation is likely. A strong preventive law approach to policymaking therefore does much to create the future factual framework in which legal disputes will arise and be resolved, whether the subject be employment relations, student discipline, racial discrimination, handicapped children, testing and evaluation, or even the levy and collection of school taxes.

Educational institutions are also composed of people who are or may be the clients of lawyers, and I would suggest as a major area for scrutiny the lawyer-client relationship itself. Nothing is more essential to the success of a preventive law program than candid, complete, and timely communication between lawyer and client.

For lawyers, this means re-examining some old assumptions. Every young lawyer learns, or thinks he or she learns, early in the practice of law that clients do not want to pay their hard earned money to a lawyer who tells them they are wrong or misguided. Everybody knows that clients pay lawyers not only to tell them they are right, but to prove they are right. This is a difficult feeling to dislodge, particularly when so many clients regularly reinforce it. But dislodge it we must

See, M. McClung, *Preventive Law and Public Education: A Proposal*, 10 J. L & EDUC. 37 (1981).

if we as lawyers are to serve those school administrators and other clients, more often the young, bright ones, who come to us not with lawsuits, hearings, and other crises, but with purposes, objectives, and plans. We will have to be more scholarly in our research, more careful and deliberate in our legal reasoning, more circumspect in our view of the client's operational setting and motivations, and more willing to venture into the realm of extralegal decisionmaking. Can we develop checklists and procedures for determining the legal health of our clients? Are "legal audits" practical and affordable? Can we make them that way? And let us certainly be mindful of the place of lawyers in the overall scheme of things. At a lecture in Austin recently, John Naisbitt, author of *Megatrends*, said "Lawyers are like beavers. They get right in the mainstream and dam it up!" Some situations brought to us by a client will not be amendable to legal analysis, and on those occasions let us have the good grace to say so.

For clients, good communication may call for a reassessment of the way in which lawyers are viewed. There are at least two ways of looking at lawyers that will do much to wreck a preventive law program before it gets started.

The first is to think of the lawyer as a technician or consultant from whom an "opinion" is sought. Clients who take this approach frequently provide only the facts that seem important to them, and all too often the concern is simply to bolster with a lawyer's opinion a course of action already decided upon or a position already taken. For some clients, one lawyer isn't enough, and they will call four or five for a sampling of opinion on their problem. Unless the relationship is a continuing one with considerable contextual knowledge on the part of both lawyer and client, those "quickie" opinions over the telephone are worthy exactly the pittance usually paid for them. Another unfortunate consequence of viewing the lawyer as a technician is the tendency to bifurcate a problem into "the educational part" and "the legal part," as if the one can be accomplished independently of the other. This leads to poor communication about purposes and objectives and a limited view of alternatives.

The other view of lawyers that seems to prevail in some quarters of the educational community is that of the "miracle worker." For these clients the law is a delphic mystery, to be invoked with incantations and magic. All one needs is blind faith in one's chosen course of action. The lawyer will find a way to vindicate it. The tendency here, of course, is not to call the lawyer until it is time to waive the magic wand, but usually that is too late, and the benefits of preventive law planning are lost.

A good preventive law approach instead calls for involving the lawyer regularly in the operations of the school district, college or university, teacher's union, advocacy group, or other institutional client. Choose a lawyer carefully, give the relationship time to develop, and don't wait until the summons arrives to do it. Be less immediately concerned with actions and positions, and more deliberately concerned with basic purposes and objectives. Understand, when the lawyer probes motives, bares secrets, and exposes weaknesses, that it is far better to suffer such indignities at the hands of one's own lawyer in the privacy of the office than at the hands of someone else's lawyer in the public glare of the witness stand. Recognize that the closer lawyer and client can come to grips with basic purposes, the more numerous the planning options will be, and the more likely a legally defensible and cost-effective plan of action will emerge. And realize the truth of the familiar oil filter commercial on TV: "You can pay us now, or you can pay us later."

And what of our professors, who, in the school law classrooms, teach us *how* to be lawyers and *how* to be teachers, counselors, and educational administrators? Both in law schools and in graduate education programs, there is often overwhelming emphasis on the case method for teaching school law—the reading and interpretation of appellate judicial opinions. This is, of course, an important element of any school law course. But any given appellate opinion represents only the tip of a large iceberg of effort by lawyers and clients. Far more cases are tried at the district court level than are appealed, and far more still are filed than are tried, and one would certainly infer that even more never find their way out of a lawyer's office. Lawyers and clients spend far more of their working moments interacting with one another than they do litigating disputes. Yet very little in the typical school law course addresses how people go about *being* clients or *being* lawyers, what their expectations of each other should be, and how they should go about communicating with one another. Lawyers often find, in dealing with school administrators, that they are at the intersection of two different universes. Whether plaintiff or defendant, lawyers and educators have inherently different ways of thinking about cases, which can have disastrous implications in the law office, or worse yet on the witness stand as the lawyer on one track warily asks questions and the client or witness educator on another track warily ventures answers. Perhaps the school law curriculum can be the place where each learns more about the way the other thinks and operates.

Perhaps, also, there is room for original research on the forms preventive legal analysis might take in particular school law problem areas. How does one design the girl's athletic program so as to

accomplish the educational goals and yet minimize the risks of being found in noncompliance with Title IX? Very little of our scholarly legal literature is being written from an overtly preventive point of view.

Preventive law may be a subject, in which NOLPE could take advantage of the many disciplines and interests found among its membership by bringing many points of view to bear on issues of common concern.

Current Issues in Reductions-in-Force

GERALD A. CAPLAN

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INTRODUCTION

In recent years, school districts across the country have been faced with the necessity of trimming teacher staffs in response to economic conditions. In accomplishing this, school boards have been faced with the problem of making reduction in force decisions that do not conflict with the statutory rights of tenured teachers. In this regard, there are some general areas of concern that a school attorney should be familiar with in advising a school district on matters related to a reduction in force. Those are:

- The nature of a tenured teacher's due process rights in a reduction in force situation.
- The necessity of insuring that a reduction in force is not simply a pretext for terminating a tenured teacher.
- The extent to which a school board may consider the qualifications of individual teachers in making a reduction in force decision, especially in connection with the decision to retain a non-tenured teacher over a tenured teacher.

Familiarity with these issues will give school boards the necessary flexibility in making reduction in force decisions, while at the same time insuring that those decisions are made for legally supportable reasons.

DUE PROCESS IN A REDUCTION IN FORCE

The grant of tenure confers significant rights on a teacher, the most important of which is an objective expectancy of continued

employment. To insure this, tenure statutes typically provide that a tenured teacher may only be dismissed for the relatively narrow reasons enumerated in the statute, and set up detailed procedural due process mechanisms to be followed in dismissing a tenured teacher.

For example, in Colorado the statutory dismissal proceedings commence with a formal filing of charges with the board of education, which either accepts or rejects them. If the board accepts the charges, the teacher is afforded the opportunity for a full adversary hearing on the dismissal before a hearing officer who makes finding of fact, which are binding, and a recommendation on whether the teacher should be dismissed, which is not. Upon receipt of the hearing officer's findings and recommendation, the board decides whether to retain or dismiss the teacher. The teacher may then obtain judicial review of an adverse decision by filing an action directly in the Colorado Court of Appeals.¹

The question which arises in a reduction in force where tenured teachers are laid off is to what extent a tenured teacher's due process rights impact upon the school board's decision making powers. Although the various state tenure statutes are usually quite explicit in the procedures to be followed in dismissing a tenured teacher so as to guarantee due process, they are oftentimes noticeably vague when addressing the reduction in force situation. Again, Colorado provides an example of this. The only statutory guidance relating to a reduction in force states:

A board may cancel an employment contract with a teacher on continuous tenure without penalty to the school district when there is a justifiable decrease in the number of teacher positions. When a justifiable reduction in the number of teaching positions within a particular endorsement area occurs, the contracts of non-tenure teachers who are occupying such positions shall be cancelled first.²

Irrespective of the lack of statutory mandates enacted to guarantee a tenured teacher procedural due process in a reduction in force, the courts have usually held that the grant of tenure nonetheless required certain minimal procedural due process standards to be followed when a tenured teacher is laid off. Specifically, the tenured teacher subject to a reduction in force must be afforded the opportunity for a hearing.³

However, the same stringent statutory requirements for the conduct of a dismissal hearing under the typical tenure statute do not apply to a

1. COLO. REV. STAT. § 22-63-117.

2. COLO. REV. STAT. § 22-63-112(3).

3. *Howell v. Woodlin School Dist.* R-104, 596 P.2d 56 (Colo. 1979); *Durfey v. Board of Educ.*, 604 P.2d 480 (Utah 1979); *Johnson v. Board of Regents*, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975).

reduction in force situation.⁴ This is because in a reduction in force situation, no charges are being alleged against the teacher.⁵ Therefore, only minimal due process standards need be met.

Those minimum standards have been defined to be:

- Notice of the proposed action in sufficient detail and timely enough to enable the teacher to present evidence relating to it.
- Notice of the reason and factual basis for the action.
- An opportunity to present testimony in the teacher's defense.
- A hearing before an impartial tribunal.⁶

In this regard, even an informal hearing before the board of education can satisfy these standards assuming timely notice has been given.⁷

Similarly, the issues to be decided at a reduction in force hearing can be restricted without offending the notions of due process. This is consistent with the judicial recognition that school boards are given broad exclusive discretionary powers, usually conferred by statute, to decide personnel and budgetary matters.⁸ As long as the board's decisions with regard to personnel matters are not arbitrary, capricious, or pretextual, they will be upheld.⁹ Under this rationale, the minimum standards of due process will be met if the hearing is limited to the issues of: (1) Was there a rational basis to determine a reduction in force was necessary? (2) Was the employment cancellation procedure arbitrary or capricious? (3) Was the decision to cancel the particular teacher arbitrary, capricious or pretextual? (4) Was the tenured teacher qualified to fill positions held by non-tenured teachers who were retained?¹⁰

In summary, an elaborate hearing procedure is not required to satisfy due process considerations in a reduction in force situation as it would be in a teacher dismissal case. As long as the tenured teacher has the opportunity for a hearing before the board on the issues of whether the reduction in force was arbitrary, capricious or pretextual, the teacher has been afforded due process.

4. *Id.*

5. See, e.g., Howell, *supra*, note 3.

6. Von Krog v. Board of Educ., 298 N.W.2d 339 (Iowa Ct. App. 1980).

7. *Id.*, see also Durfey, *supra*, note 3.

8. See, e.g., Ball v. Weld Cty. School Dist. No. RE-3J, 545 P.2d 1370 (Colo. App. Ct. 1975); Newman v. Board of Educ., 424 N.E.2d 1331 (Ill. Ct. App. 1981); COLO. REV. STAT. § 22-32-110.

9. Newman, *supra*, note 8.

10. See, e.g., Howell v. Woodlin School Dist. R-104, *supra*, note 3 interpreting the due process requirements of COLO. REV. STAT. § 22-63-112(3), the text of which appears above.

AVOIDING THE PRETEXTUAL REDUCTION IN FORCE

A reduction in force proceeding is one of the few situations in which a tenured teacher's right to continued employment is not fully protected by the applicable tenure statute. Because of this, it can be abused. In the case where a board desires to terminate a tenured teacher but cannot satisfy the applicable statutory grounds for dismissal or wishes to avoid the complicated statutory procedures for doing so, there is temptation to use a reduction in force as a pretext to circumvent the requirements for dismissing a teacher under the tenure statute.

The courts have been quick to respond to this possibility. In commenting on the school board's discretionary authority in a reduction in force, the Illinois Appellate Court stated:

But we stress that this discretion must be exercised with the extreme caution and circumspection in order not to subvert another fundamental purpose of the Tenure Act, that being the protection of teachers from political, partisan, capricious, fickle, and irregular decision making. We are also not unmindful that particular school boards—whether in good faith or bad—may rearrange curriculum and teaching positions in ways which defeat the rights of tenured teachers. Such a practice cannot be tolerated under the guise of discretionary authority and duty.¹¹

Similarly, in *Hagarty v. Dysart-Geneseo Community School District*,¹² the court stated, "we could not countenance a subterfuge by which an unscrupulous school board would use a fictitious necessity for staff reduction as a pretext for discharging a teacher." Therefore, a school board contemplating a reduction in force is going to have to examine its collective conscience to insure that there are substantive reasons underlying the perceived necessity to trim the professional staff in the district.

An analysis of the cases indicates that there are some circumstances which will generally always constitute substantive reasons for implementing a reduction in force. These circumstances can be broadly classified under the headings of either a financial exigency or a program change.¹³ A financial exigency can occur any time that a school district, for budgetary reasons, is unable to maintain staffing at existing levels. A program change refers to any elimination, curtailment or reorganization of curriculum, or a reorganization or consolidation of individual schools, and does not necessarily have to occur for financial reasons.

11. Newman, *supra*, note 8 at 1337.

12. 282 N.W.2d 92 at 98 (Iowa 1979).

13. See, Howell, *supra*, note 3; Cooper v. Fair Dismissal Appeals Bd., 570 P.2d 1005 (Or. Ct. App. 1977).

As long as there is a rational underlying basis for the board to either find a financial exigency or to require a program change within the school district, a reduction in force motivated by these conditions will withstand a legal attack based on the argument that it is merely a pretext for a teacher dismissal. Again, this is consistent with the broad exclusive and discretionary powers relating to curriculum and personnel matters which are vested in school boards by law.

In fact, the Utah Supreme Court affirmed a special jury verdict upholding the dismissal of a tenured teacher in a reduction in force where the jury found that even if there had been an improper motive in terminating the plaintiff (*i.e.*, on account of his activities in local and state education associations), he would have been terminated anyway as part of a reduction in force caused by a bona fide financial exigency and program change.¹⁴ While this may be an extremist position given the possibility of an improper motive, it nonetheless illustrates the effect of being able to show a rational underlying basis for implementing a reduction in force should the decision be challenged in the courts.

Two conditions are always either expressly or impliedly acknowledged in the cases as constituting rationale bases for the board to either find a financial exigency or require a program change followed by a reduction in force. These conditions are declining student enrollment or budgetary cutbacks.¹⁵

Declining student enrollment does not have to occur across the board to justify elimination of teaching positions, although that most commonly is the case. Even if it is shown that enrollment in a particular program has declined the board may justifiably eliminate teaching positions in that program, or the entire program.¹⁶ This frequently is necessary in smaller school districts which cannot afford the luxury of maintaining elective course offerings where there is not sufficient student interest. In this case, the fact that the overall student population in the school district may not have declined is not as germane as showing that enrollment for a particular program has declined to the point where it is no longer feasible to offer that program.

Finally, to defeat a pretext argument in the courts, there must be competent evidence on the record which supports the school board's reasons for implementing the reduction in force.¹⁷ This evidence should

14. Durfey, *supra*, note 3.

15. Von Krog, *supra*, note 6; Durfey, *supra*, note 3; Platko v. Laurel Highlands School Dist., 410 A.2d 960 (Pa. Commw. Ct. 1980); Bednar v. Butler Area School Dist., 410 A.2d 922 (Pa. Commw. Ct. 1980); Fort Sumner Mun. School Bd. v. Parsons, 485 P.2d 366 (N.M. 1971); Herbach v. Board of Educ., 419 N.E.2d 456 (Ill. App. Ct. 1981); Shandy v. Portland School Dist., 634 P.2d 1377 (Or. Ct. App. 1981).

16. See, *e.g.*, Cooper, *supra*, note 13.

17. Von Krog, *supra*, note 6.

ideally consist of the testimony of appropriate school officials given at the reduction in force hearing, along with any supporting exhibits. For this reason, a record should be made at the hearing.

In the final analysis, the courts are only interested in insuring that a reduction in force does not become a shortcut to defeat the rights of tenured teachers under the tenure statutes. For that reason they have, on occasion, required school districts undergoing a reduction in force to demonstrate that there are valid reasons justifying staff cutbacks. Because this involves essentially a "rational basis" test, it is not an undue burden for school districts to meet. Therefore, they should not be hesitant to implement a reduction in force when conditions justify it.

RETAINING QUALIFIED PROBATIONARY TEACHERS OVER UNQUALIFIED TENURED TEACHERS

When deciding how to implement a reduction in force, school districts need to be able to insure that tenure rights will not interfere with their ability to retain qualified teachers in the classrooms. A question which frequently arises is whether a qualified probationary teacher can be retained in preference to an unqualified tenured teacher. The answer is yes, especially if the decision on qualifications can be made with reference to objective criteria.

In general, probationary teachers must always be the first to go in any reduction in force.¹⁸ Also, a school district must make the effort to transfer a tenured teacher to another position if eliminated.¹⁹ However, when the issue was whether a tenured teacher was qualified to occupy the position held by the probationary teacher, the courts have carved out an exception and allowed school districts to lay off tenured personnel who were not qualified for a position while retaining probationary employees who were.²⁰

The issue of how to judge who is qualified is of paramount importance. The cases express a strong preference for the use of objective criteria.²¹ They indicate that for a teacher to be considered qualified for a position in a reduction of force situation, the following criteria must be met:

18. See, e.g., COLO. REV. STAT. § 22-63-112(3).

19. Cooper, *supra*, note 13.

20. Shandy, *supra*, note 15; Higgins v. Board of Educ., 428 N.E.2d 1126 (Ill. App. Ct. 1981); Herbach, *supra*, note 15; Lenard v. Board of Educ., 373 N.E.2d 477 (Ill. App. Ct. 1978); Evans v. Mount View School for Girls, 525 P.2d 1172 (Colo. Ct. App. 1974); Fort Sumner, *supra*, note 15.

21. See, Von Krog, *supra* note 7 at 343.

- The tenured teacher must possess a valid teaching certificate, endorsed for the subjects being taught in the probationary teacher's position.
- The teacher must possess any additional educational background requirements (usually semester hour requirements in specific subjects) required under regulations promulgated by state boards of education applicable to the position occupied by the probationary teacher. In this regard, the courts have upheld the state board's authority to promulgate these regulations in *Lenard v. Board of Education*.
- The teacher must meet any other requirements for the position imposed by the external authority which accredits the school district (i.e., the North Central Association).²²

As long as the tenured teacher meets these criteria, he or she will probably be considered qualified to bump a probationary teacher and occupy his or her position. This is true even if the probationary teacher may have more experience and training applicable to that particular position.²³ Conversely, failure to meet any one of them will allow the probationary teacher to be retained.²⁴

The question also arises as to the time at which qualifications are to be judged by the school board. For example, tenured teachers who are unqualified for any other position at the time their position was eliminated have argued that they could upgrade their qualifications (i.e., by attending summer courses to meet minimum semester hour requirements applicable to another position) so as to be able to occupy a position held by a probationary teacher. The courts have treated this argument with little sympathy and have ruled that the issue is one of *present* qualifications and not possible future qualifications.²⁵ A tenured teacher will not be allowed to bump a probationary teacher based on the pious hope that he or she will become qualified for the position in the future. From a school board's perspective, this is a favorable judicial response, since it will allow a board to make decisions about a teacher's qualifications based on the actual qualifications existing as of the time the decision is made rather than mere expectations about the future.

A tenured teacher seeking to bump a probationary teacher must be qualified for all aspects of the probationary teacher's position. If the tenured teacher is only qualified to teach some of the courses taught by the probationary teacher, he or she will not be considered qualified for

22. See, e.g., *Lenard, supra*, note 20; *Fort Sumner, supra*, note 15.

23. *Cooper, supra*, note 13.

24. *Lenard, supra*, note 20.

25. *Shandy, supra*, note 15; *Evans, supra*, note 20.

the position, and the school district may retain the probationary teacher.²⁶

Likewise, although the district is obligated to transfer tenured teachers into positions for which they are qualified, it does not have to create such a position for them where none formerly existed. A district does not have to make curriculum changes which would have the effect of opening up a position for which the teacher is qualified.²⁷ Also, the tenured teacher cannot insist that the district create a position for him by drawing one or two classes he is qualified to teach from other teachers whose positions he is otherwise not qualified to fill.²⁸ Finally, there is also authority to the effect that the district is not required to shuffle teaching assignments about in such a way that it would be unreasonably disruptive to the district simply to open up a position.²⁹

In the final analysis, school boards have wide discretion and autonomy to insist that qualified teachers staff the classrooms. The importance of this is paramount to that of staff tenure rights in a reduction in force. For this reason, a decision to retain a qualified probationary teacher over an unqualified tenured teacher is permissible and has been affirmed by the courts when they have reached the issue.

CONCLUSION

The practitioner advising a school board in connection with a reduction in force can appreciate that the board has great flexibility in implementing its decision. As long as the board's actions are not arbitrary, capricious or pretextual, and they afford somewhat minimal due process protections to tenured teacher, the board's decisions will withstand judicial scrutiny. Understanding this will enable the board to devote a greater degree of their attention to making the difficult decisions associated with a reduction in force rather than worrying about the legal ramifications of their actions.

26. Fort Sumner, *supra*, note 15.

27. *Id.*

28. Higgins, *supra*, note 20.

29. See, Shandy, *supra*, note 15; Von Krog, *supra*, note 6.

First Amendment Claims By Public Employees

GERALD A. CAPLAN*

Together with the due process and equal protection of the laws guarantees, the first amendment free speech right is probably the most frequently asserted constitutional challenge to the dismissal or discipline of a school district employee. Such a claim typically arises with an employee allegation that his or her termination, for example, was motivated by a statement he or she made, orally or in print, with which the board of education or a supervisory administrator disagreed.

In recent years, the United States Supreme Court has established a format of shifting burdens of proof to be used in analyzing these claims. This involves an initial showing by the teacher that his or her conduct was a "substantial" or "motivating" factor in the termination decision. The board of education may then rebut this showing by establishing, by a preponderance of the evidence, that it would have reached the same decision even in the absence of this conduct.¹ In short, for the teacher to prevail, the evidence must show that he or she would have been rehired *but for* the constitutionally protected conduct.²

There is, however, a threshold issue preceding the *Mount Healthy* analysis: did the teacher engage in conduct which is entitled to constitutional protection at all? In its last term, the Supreme Court addressed this question in *Connick v. Myers*.³

Connick is a successor to the Court's opinion in *Pickering v. Board of Education*,⁴ wherein the Court set out the basic framework of competing legal interests involved in these cases. On the one hand, public employees may not be compelled, as a condition of employment, to surrender the first amendment rights enjoyed by all citizens to comment on matters of public interest. However, the state, as employer, has significantly greater interests in regulating the speech of its employees than that of the citizenry at large.

* See Chapter 2 for biography.

1. *Mount Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977).

2. *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 417 (1979).

3. 103 S. Ct. 1684 (1983).

4. 391 U.S. 563 (1968).

The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.⁵

The teacher in *Pickering* had publicly commented on a school district financial controversy which was clearly a "matter of legitimate public concern" to the electorate.⁶ Similarly, in *Givhan*, which held that a private expression of opinion was protected, the subject matter, racially discriminatory school policies, was of public concern.

However, until *Connick*, the line between protected conduct and conduct which was essentially beneath the dignity of federal law, or, in fact, whether any speech short of libel or obscenity fell in the latter category, had not been analyzed by the Supreme Court in this context. The Court concluded that although all expression, again except the very narrow class including obscenity, was within the ambit of the first amendment, the protection accorded employee expression on matters of legitimate public concern was subject to limitation.⁷

When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

We hold . . . that *when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest*, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Our responsibility is to insure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state. [emphasis added]⁸

By this holding, the Supreme Court has required that before any balancing of interests and before application of the *Mt. Healthy*

5. *Id.* at 568.

6. *Id.* at 571-72.

7. *Id.* at 720.

8. *Id.* at 719, 720.

analysis, the teacher must show that the conduct involved was protected, *i.e.*, that it related to a matter of "political, social, or other concern to the community." Importantly, this determination is a question of law to be decided by the trial court, not a jury, and, as such, is not binding on an appellate court.⁹ It may further be noted that the *Pickering* balancing test, if the public concern question has been resolved in favor of the teacher, is probably also a legal question addressed to the Court.¹⁰

The "public concern" question directed to the Court is to be determined from the "content, form and context of a given statement, as revealed by the whole record."¹¹ The *Connick* opinion on this issue is limited to the facts of the case and, therefore, not comprehensive, it makes clear that not every occurrence within a governmental office nor every criticism of a public official is a public concern.¹²

The employee there was dismissed for circulating a questionnaire among the other employees relating to their confidence in their superior and office morale. The Court concluded that, with one exception, the questions were merely an attempt by an employee to "gather ammunition" in her continuing controversy with her superiors.¹³ The employee's conduct was not intended to inform the public of wrongdoing within a public office or to disseminate information relevant to the performance of an elected official. Basically, what was involved was a private dispute between an employee and her superior, and her conduct in that form and context was not actionable.

Every claim will, of course, present a unique set of facts and circumstances. General analytic guidelines can be derived from opinions concerning the fundamental role of the free speech guarantee in the American constitutional democracy. Thus, expressions of fact or opinion on matters of political and social consequence will most certainly fall within the protection of the first amendment.¹⁴

However, just as plainly, mere interpersonal disputes, even if related to the operation of a public body, should not be sufficient to raise a federal claim. For example, the teacher who becomes embroiled with his principal over a classroom assignment, resulting in an argument or exchange of combative memoranda, may not immunize himself from disciplinary response with the shield of the free speech right. In such a case, *Connick* gives the school district a summary basis to dispense with employee litigation.

9. *Connick*, *supra* note 3 at 720 n.7; *Mt. Healthy*, *supra* note 1.

10. *Connick*, *supra* note 3 at 722 n.10.

11. *Id.* at 720.

12. *Id.* at 721.

13. *Id.*

14. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1976).

Decisions preceding *Connick* in the lower courts sometimes considered the "public concern" issue as an element of the *Pickering* balancing test or the *Mt. Healthy* analysis.¹⁵ But *Connick* is clear that the decision whether the employee engaged in protected conduct precedes both of these considerations. *Pickering* applies to determine if the state's response to an employee's protected conduct was justified, given the state's interests.¹⁶ *Mt. Healthy* presumes protected conduct and addresses causation with respect to an alleged governmental response.

For reference, although it is beyond the scope of this chapter, the final portion of the *Connick* opinion includes a review and application of the balancing test by the Court. The Court sets forth a number of factors which can be considered as affecting the state's interest in promoting efficiency, integrity and discipline in its operations. These include the closeness of the working relationship necessary between the employee and his or her superiors and the degree to which the conduct may disrupt that relation; the manner, time and place of the expression as they relate to the regular functioning of the affected operation; and, the context within which the conduct took place.¹⁷

The closing comments of the Court are an appropriate summation of the principles of constitutional law involved:

[T]he First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office. Although today the balance is struck for the government, this is no defeat for the First Amendment. *For it would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance that we see presented here.* (emphasis added)¹⁸

CONCLUSION

In employee claim of violation of the free speech right in employment dismissals or discipline, a three-fold process of review should be made: (1) Was the conduct in question constitutionally protected under *Connick* in that it affected matters of legitimate public concern?

15. *McGill v. Board of Educ. of Pekin Elem. School*, 602 F.2d 774 (7th Cir. 1979); *Key v. Rutherford*, 645 F.2d 880 (10th Cir. 1981).

16. *Connick*, *supra* note 3 at 722.

17. *Id.* at 722-24.

18. *Id.* at 725.

(2) If so, was the school district's action in response to the conduct justified in *Pickering* in light of the school district's interest in the efficiency, integrity and discipline of its operation? (3) Was the school district's action motivated by the employee's protected conduct or were there other, constitutionally neutral factors that would have caused the action in the absence of the protected conduct, as described in *Mt. Healthy* and *Givhan*?

As can be seen, the *Connick* issue is the threshold question, for in the absence of protected conduct further inquiry is unnecessary. To the practitioner, *Connick* gives a basis for summary dismissal of the meritless claim arising from the attempt to constitutionalize what is merely a private employee dispute.

Group Insurance, Bond Issuance and Annuity Programs

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Each of these subjects is broad enough to fill a book and then some. Thus, this chapter will be limited to some recent concerns in these areas and some newly emerging ones.

In each of these areas one can make three generalizations.

- 1) Each is more complex than it has been and each are becoming increasingly more complex.
- 2) Each raises more problems and more varied problems.
- 3) Each will impact significantly on school district operations in the years ahead and each will therefore involve more staff and administrative time.

Let us look first at Group Insurance. This area has developed into a major bargaining concern. Its importance has increased greatly as the salaries of school employees have escalated, particularly in the recent periods of great inflation. Often, higher salaries have generated only a larger tax bite by both the state and federal government. Simultaneously, the costs of health insurance have skyrocketed, particularly mental health costs. Add to this the impact of state and federal antidiscrimination legislation and medical cost containment legislation and one can see the basis of the increasing concerns in this area.

What then are some of the problems facing school districts in the group insurance area today? One problem in the health insurance area is the impact of the HMO or Health Maintenance Organization. The number of HMO's has increased dramatically in recent years as an alternative to the escalating costs of health insurance. HMO's vary greatly in the type of services they provide and the choices available to

their members. Some allow a very limited choice of doctors and hospitals. These designate the person to provide the care and the location at which that care is to be provided. Others allow the user a wide selection of doctors as well as various hospital choices. Perhaps the largest user of HMO's today is the federal government who has initiated these programs in lieu of health insurance in most large metropolitan areas.

When must a school district offer a HMO? Under the Health Maintenance Organization Act of 1973, school districts were not required to provide this type of coverage (P.L. 93-22). Subsequently, Public Law 94-460 was enacted to require school districts to permit employee participation in HMO's in lieu of participation in the school district's group health insurance plan if: The school district offered a health insurance plan to employees; 25 employees live in the HMO service area; and application was made by the HMO to the school district. This application must be submitted in writing, must be directed specifically to the chief executive official of the public entity, and it must be received at least 180 days before the expiration or renewal date of a health benefit contract and at least 90 days before expiration of a collective bargaining agreement. State laws may mandate longer notice periods.

Public Law 94-460 does not specifically include school districts in the definition of "political subdivision" under section 110.801(c) of the regulations, but the officials responsible for implementing the regulations have adopted the position that the statutory mandate applies to school districts.

A HMO must be a "qualified HMO" to be eligible to participate in a school district program. Qualification is usually determined by the state department of insurance. In Illinois, however, this determination is made by the department of public health. One should check in their own state to determine the applicable governmental body charged with this responsibility. To date, the federal role in enforcement in this area is minimal.

There is one final problem relating to a school district's obligation to offer membership in a HMO. That problem involves the obligation of the employer to advise the collective bargaining representative in the district where employees are represented by such a representative, of the HMO request. If accepted by the bargaining representative, it must then be offered to each employee.

No employer is required by federal law to pay more for health benefits as a result of the provision of a HMO than is required by a

prevailing collective bargaining agreement or other health benefits contract.

A second issue in the group insurance area is the provision of double coverage where employees are members of the same household or an employee's spouse has superior coverage at another employer. This has recently become a major concern in several suburban Chicago school districts. The provision of double benefits really inures to the benefit of no one except the insurance company due to the coordination of benefits between companies. Frequently a district will attempt to provide two single coverages, thereby avoiding the great expense of dependent coverage. The obligation to provide dual coverage to employees is generally dependent upon the precise contract language. This is an area, however, where some school districts could save substantial sums of money or alternatively provide employees with more meaningful benefits.

A third area of concern in group insurance is the development of cafeteria fringe benefit plans. These plans permit employees to choose among a variety of benefits by establishing a fixed cost per employee for all fringe benefits. These have become increasingly popular as employees seek more benefits without taxable consequences. The usual items included in such packages are single and dependent health, vision, dental and prescription insurance, life insurance, disability insurance, tax sheltered annuities, tuition reimbursement, and coverage for out of pocket medical costs. Among the more exotic proposals are group automobile and homeowners insurance.

The proliferation of tax sheltered freebies has, of course, inspired the internal revenue service to seek to tax fringe benefits unless specifically excluded by Congress. The definition of "gross income" in the internal revenue code is extremely broad. "Gross income" is defined as all compensation, whether direct or indirect, monetary or "in kind" not specifically excluded by Congress.

Over the years this definition has been administered in a very haphazard fashion by the internal revenue service. When they attempted to tax fringe benefits in 1978, Congress clamped a moratorium on their authority to do so. This moratorium currently expires on December 31, 1983, but will, in all probability, be extended because Congress failed to adopt definitive and comprehensive legislation in the area.

House Resolution 3525 was introduced and provides for taxation of fringe benefits unless one of three exclusionary rules applies.

- 1) It is incident to the employers trade or business, the cost is insubstantial and it is provided on a nondiscriminatory basis.
- 2) It is provided primarily for the benefit of the employer rather than the employee.
- 3) If the benefits are insubstantial and it is not provided on a frequently recurring basis.

At least eight bills have been introduced to prevent the internal revenue service from taxing various fringe benefits. To date the final word on this issue has not been uttered; but, as the federal government looks for greater sources of revenue, this area must be considered a prime target.

How then can school employees shelter their income so as to prevent the government from taking such a big bite? There are three shelters which deserve at least some comment in view of their great attractiveness to defer taxes. These three are board paid teacher retirement, tax sheltered annuities and deferred compensation. Each of these can be used simultaneously, but threading one's way through the internal revenue code to assure compliance with its dictates may be more difficult than the proverbial camel getting through the eye of a needle.

One method of tax sheltering is through board-paid retirement. Under section 414(h) of the internal revenue code a board may pick up and pay an employee's contribution to a state retirement or pension program. The board's payment of this defers the income taxability of the contribution in the year it is made. Instead, the employee must treat this as income when it is received at retirement. This has become a frequently bargained item in recent years as it effectually increases the net pay of the teacher at the time the contribution is made. It may in individual circumstances, however, have extremely disadvantageous results for the employee. For example, if an employee quits teaching and these tax sheltered contributions are removed from the retirement system in a lump sum before retirement, the monies become taxable income at the time of removal. Because this could be a large sum of money it could easily propel a person in the 20 to 25 percent tax bracket into the 40 to 50 percent tax bracket. The consequences are obvious.

A second method of tax deferral is the utilization of tax sheltered annuities. Under section 403(b) of the internal revenue code employees may purchase tax sheltered annuities. This is frequently accomplished by means of a salary reduction from the participating employee's salary. These deductions are excludable from gross income in the year the contribution is made provided the sum contributed does not exceed a certain defined amount. The maximum amount which can be contributed is 20 percent of the employees income multiplied by the

number of years of service, less the "aggregate of the amount contributed by the employer for annuity contracts and excludable from gross income in any prior taxable year."

Finally, one can look to deferred compensation plans under section 457 of the internal revenue code. A deferred compensation plan may be established for employees of state and local governmental bodies. An eligible plan must meet the following requirements:

- 1) Only individuals who perform services for the local governmental body may participate.
- 2) The plan provides that compensation will be deferred for a calendar month only if the agreement providing for such deferral has been entered into before the beginning of the month.
- 3) The plan does not provide that amounts available under the plan will be made available before the employee is separated from service with the governmental entity or is faced with an unforeseeable emergency.
- 4) The plan provides that all deferred compensation and property or rights purchased with such deferred compensation, and all income attributable thereto shall remain, until paid out, solely the property of the governmental entity and thereby subject to the claims of general creditors.
- 5) The plan establishes a specific ceiling on the amount of compensation which can be deferred.

It is imperative that any deferred compensation plan be reduced to writing and carefully reviewed by legal counsel to validate its compliance with the law.

The governmental entity may invest the deferred compensation sums with the permission of the employee. This would include investments in annuities or life insurance. If the governmental entity does invest these sums on behalf of an employee, the governmental entity is obligated to return to the employee only the current value of the investment. The employee thus bears all the risk in any deferred compensation plan. For example, if the governmental entity were to go bankrupt, the employee would be only a general creditor of the employer.

The maximum amount an employee may defer is the lesser of \$7,500 or one-third of the employee's income. However, in an employee's last three years of employment, the employee may defer the lesser of \$15,000 or any amount the employee could have deferred under the deferred compensation plan in prior years but did not, plus the normal amount which one could defer in the final three years.

Even from this brief description one can perceive the difficulty in reconciliation of the gross amount of income which can be deferred

under the various plans. Clearly, any deferred compensation plan contributions and tax sheltered annuity contributions must be taken together in determining the maximum amount which can be contributed in one year. It would also appear that board paid retirement benefits must also be included in this computation.

How does the school district, charged with withholding income tax of an employee, make the proper determination that it is withholding the proper amount of income tax? If excess contributions to a tax deferred plan are made, the deferral is invalid. There are serious penalties attributable to an employer who wilfully fails to withhold the proper amount of taxes. Generally, a miscalculation by the employer will not be treated as a wilful failure to withhold.

To protect a school district, the district should obtain a hold harmless agreement from the employee to the effect that the proper amount has been withheld and that the employee will indemnify the district for any tax, interest or penalties incurred by the district as a result of improper withholding. Perhaps a better alternative would be for the district to deal only with annuity companies who would execute a similar hold harmless agreement.

Finally, let us talk briefly about the potential problems facing school districts as a result of the proposed arbitrage rules issued by the internal revenue service and the new registration requirements required by T.E.F.R.A., the Tax Equity and Fiscal Responsibility Act of 1982. Each of these have an adverse impact upon the finances of a school district.

Under T.E.F.R.A., effective July 1, 1983, all debt obligations of governmental bodies must be issued in registered form as opposed to bearer form. This essentially requires that when a debt obligation is transferred to a new owner, a new certificate must be issued to the purchaser and the old certificate must be retired. Previously, the mere transfer of the bond certificate to the new purchaser was all that was required for transfer of ownership.

The widely circulated story for the rationale behind this change was that drug dealers, particularly in Florida, were using bearer bonds as a method of paying for drugs, because there was no record required of the transfer of bearer bonds. This provided a ready basis for payment with little of the attendant risks of cash. There does not appear to be any hard evidence, however, that this was actually occurring.

The result of this modification in the law has had some impact on the costs attendant to a bond issuance. It was initially believed that registration would add between 30 and 75 basis points to the bid price of a bond issue. This is somewhere between 1/3 and 3/4 of a percentage point. To date it is not clear that this price increase has occurred,

although it is generally believed that there has been some modest increase in the price governmental bodies are required to pay for bonds or other evidences of indebtedness that they sell.

The cost of printing bonds has generally increased as a result of this legislation. Bonds are now printed in essentially the same form as a stock certificate and interest coupons are no longer attached to the bond. In any issue where there is a likelihood that there will be a great number of subsequent transfers of the bonds, many more certificates for each maturity must be printed, as a new certificate must be issued upon each transfer.

The requirement to issue a new certificate upon each transfer generally requires the employment of a registration agent, *i.e.*, some bank or similar institution which will be responsible for safely maintaining unissued bond certificates and keeping a record of any transfers. This is a totally new cost which is becoming significant in the issuance of bonds.

The registration issue also suggests that there will be increased attempts by the United States Securities and Exchange Commission to adopt a greater role in municipal bond offerings. There have been inklings of this in the past, but the establishment of municipal bond offerings on a substantial par with private offerings increases this probability. If this does occur, there could be greatly increased costs attendant to a bond issuance if governmental entities are required to prepare the types of pre-issuance publications required in the private sector.

Let us turn now to another potential significant cost item for school districts. The internal revenue service has proposed significant modifications to the existing arbitrage rules. First, what is arbitrage? Arbitrage is the use of borrowed money to make money. Interest on most governmental bonds is exempt from federal taxation. However, obligations defined as arbitrage bonds are subject to taxation.

The purpose of the arbitrage rules is to ensure that governmental bodies do not borrow money needlessly, *i.e.*, that the purpose of a borrowing is not to accumulate capital to generate interest income. Under the present regulations, governmental bodies borrowing monies to meet cash flow purposes may borrow their anticipated cash shortfall plus one additional month's operating expenses. Under the proposed rules, this amount would be reduced to 105 percent of the cumulative cash deficit.

An example of the impact of this might help. In one Florida district, the cumulative deficit in the district last year was \$650,000. Under the proposed rules, this district would be permitted to borrow a maximum of \$682,500. By contrast, the monthly payroll expenditures in this

district alone are in excess of \$12,000,000. Thus, the legal borrowing in this district has effectively been reduced by at least \$11½ million.

The demands by governmental units to borrow funds to operate are increasing greatly nationwide with the uncertainty of real estate tax revenues. These rules will only serve to make it more difficult for districts in financial difficulties. These proposed rules also impose other new requirements. One relates to the necessity to include the yield on an acquired obligation held during a temporary period. The other requires that investment proceeds on acquired obligations be taken into account in determining whether the proceeds will exceed the amount necessary for governmental purposes.

Again, an example of the impact of this might help. If a district is going to issue bonds to construct a building which, for purposes of this example, we will assume will cost \$10,000,000, the district must determine what interest it will earn on the capital funds received from the bonds issuance. Previously, most districts would have issued their bonds for approximately the \$10,000,000 in question. Under these rules, the district must now issue bonds in a lesser amount to take into account the interest it will earn on the bond proceeds before they are paid out to contractors. The exact lesser amount will require a guesstimate of the interest that will be earned on the proceeds over the length of time the proceeds are held. For example, if the district guesses that interest rates will fall over the term the proceeds are held, the district will need to issue bonds in a greater amount than if it believes interest rates will remain constant or rise. However, if interest rates rise instead of fall, the district could be in an arbitrage situation because the district has not properly estimated the amount of income that would be earned. On the other hand, if interest rates fall when the district believes those rates would rise or stay the same, the district will have inadequate funds to meet the construction costs incurred.

Finally, there is one more item of concern in this area—Public Act 98-21, enacted in April, 1983. This act amended the social security law to provide that tax exempt interest must be taken into account along with other income in determining the amount of social security benefits to be taxed. Senate Bill 1113 has been introduced to repeal this act but its future is uncertain. Many feel that the inclusion of these interest amounts in social security determinations will force municipal bond interest rates upward to areas more in line with private issues.

Clearly, the prognosis for lower costs in the areas of group insurance and bond issuance are dim. School districts will continue to face more complicated areas of concern in these areas in the years ahead. Some say that "no news is good news." In these areas that may very well be true.

Legal Responsibility of Educators in Child Abuse

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INTRODUCTION

In 1982, over 850,000 cases of child abuse and neglect were reported in the United States.¹ School administrators and teachers have an important role to play in the elimination of child abuse. They are literally on the front lines in fighting a problem that has reached epidemic proportions.²

Since the 1960's, with the recognition of the "battered child syndrome,"³ states have enacted legislation defining child abuse and requiring physicians and certain professionals to report suspected cases of child abuse and neglect to specified state and local agencies.⁴ The first

1. See generally, U.S. Department of Health and Human Services, 1983 Report by the National Center on Child Abuse and Neglect.

2. The American Humane Association found in 1976 that 413,000 cases of child abuse and neglect had been reported. To date the figure may be as high as 900,000 with projections that it will surpass one million in a year. See, *Child Abuse: The Ultimate Betrayal*, TIME (Sept. 5, 1983).

3. "Battered Child Syndrome" is the condition of children who have sustained serious or repeated physical injuries by non-accidental means. The injury is usually inflicted by a parent or one who is caring for the child. See, Kempe, Silverman, Droegmueller & Silver, *The Battered Child Syndrome*, 191 J.A.M.A. 17 (1962). See also Sussman, *Reporting Child Abuse: A Review of the Literature*, 8 FAM. L.Q. 245 (1974). Courts have also accepted the syndrome as a legitimate medical diagnosis. See, e.g., *Landeros v. Flood*, 551 P.2d 589 (Cal. 1976); *James v. Maryland*, 248 A.2d 910 (1968); *Commonwealth v. Labbe*, 373 N.E.2d 227 (Mass. App. Ct. 1978); and *People v. Hensen*, 349 N.Y.S.2d 657 (N.Y. 1973).

4. By 1965 all fifty states and the District of Columbia, enacted legislation requiring physicians and other professionals to report. See Kohlman, *Malpractice Liability for Failing to Report Child Abuse*, 49 CAL. ST. B.J. 119 (1974).

generation of these statutes focused attention on the role physicians, health officials, and law enforcement personnel must have in reporting suspected cases of child abuse.⁵ Little attention to the role educators could play was given by states. It was discovered that physicians, health officials, and law enforcement agencies rarely came in contact with abused children, except in the most severe cases.⁶ Teachers and school administrators, however, are in a unique position to observe children over extended periods of time on a daily basis.⁷ In recognizing the role educators could play, states have enacted second and third generation legislation requiring teachers and administrators to report cases of suspected child abuse. This chapter will explore the legal responsibilities of educators concerning the problem of child abuse. The first section will define child abuse; section two will examine the statutory requirements providing for teacher and administrator responsibility; and section three will highlight the issues of liability. The chapter will conclude with the examination of the characteristics of abused children and suggested guidelines for school districts to consider in confronting the issues of child abuse.

DEFINING CHILD ABUSE

The Federal Government under the Child Abuse Prevention and Treatment Act of 1974,⁸ defines child abuse and neglect as,

the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of eighteen, or the age specified by the child protection law of the state in question, by a person, who is responsible for the child's welfare under the circumstances which indicate that the child's health or welfare is harmed or threatened thereby. . . .⁹

Most states have developed definitions similar to the above. Some states, however, have different age limitations based on the maximum age of juvenile court jurisdiction, and some do not include sexual offenses as part of the above statute.

Abused child, as defined by the State of New York, means a child less than eighteen years of age whose parent or other person legally responsible to care,

5. See, Comment, *Civil Liability for Failing to Report Child Abuse*, DET. C.L. REV. 135, 139 (1977).

6. Fraser, *A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHIL. & KENT L. REV. 641, 657-58 (1978).

7. *Id.*

8. 42 U.S.C. §§ 5101-5106 (1977 & Supp. 1979).

9. *Id.* at § 5102.

- 1) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of any bodily organ, or;
- 2) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted impairment of the function of any bodily organ or;
- 3) commits, or allows to be committed, a sex offense against such child, as defined in the penal law, provided, however, that the corroboration requirements contained therein shall not apply to proceedings under this article.¹⁰

Although there are some slight variations among the states as to the precise definition of child abuse, they are in general, similar.¹¹ Once having defined the abused child, it is essential to determine who he or she is. Identification of victims is necessary if the state is going to protect the child and end the abusive treatment.¹² Therefore, the states established child abuse laws with mandatory reporting requirements of certain professionals, including teachers.

STATE REPORTING STATUTES

The legislatures in all fifty states and the District of Columbia recognized the need to ensure the identification of abused children. Therefore, they enacted reporting laws requiring certain professionals to report suspected abuse cases.¹³ Today, every jurisdiction requires certain professionals, including teachers and administrators to report suspected cases of child abuse.¹⁴

10. N.Y. FAM. COURT ACT § 1012 (1973).

11. See generally, U.S. Department of Health and Human Services, National Center on Child Abuse and Neglect, *Critical Issues in Child Protective Services*, 1, 6-9 (1980).

12. PAULSEN, *THE LAW AND ABUSED CHILDREN IN THE BATTERED CHILD* 8-9 (2d ed. 1974).

13. *Comment*, *supra* note 5 at 139.

14. See, ALA. CODE § 26-14-3(a) (1975); ALASKA STAT. § 47.17.020 (1979); ARIZ. REV. STAT. ANN. § 13-3620 (1978); ARK. STAT. ANN. § 42-808 (1977); CAL. PENAL CODE § 1165-66 (West Supp. 1981); COLO. REV. STAT. § 19-10-104(2) (1) (1978); CONN. GEN. STAT. ANN. § 17-38a (West Supp. 1981); DEL. CODE ANN. tit. 16, § 903 (Supp. 1980); D.C. CODE ANN. § 2-162 (Supp. 1978); FLA. STAT. ANN. § 827.07(3)(d) (West Supp. 1981); GA. CODE ANN. § 74-111(a) (Supp. 1981); HAWAII REV. STAT. § 350-1(a) (Supp. 1980); IDAHO CODE § 16-1619 (1979); ILL. ANN. STAT. ch. 23, § 2054 (Smith-Hurd Supp. 1981-82); IND. CODE § 31-6-11-3 (Supp. 1980); IOWA CODE ANN. § 232.69(b) (West Supp. 1981-82); KAN. STAT. ANN. § 38-717 (Supp. 1980); KY. REV. STAT. § 199.335(2) (Supp. 1980); LA. REV. STAT. ANN. § 14:403C(1) (West 1974 & Supp. 1981); ME. REV. STAT. ANN. tit. 22, § 4011(1) (Supp. 1980-1981); MD. ANN. CODE art. 27 § 35A(c) (1976 & Cum. Supp. 1980); MASS. ANN. LAWS ch. 119, § 51A (Michie/Law Co-op Supp. 1980); MICH. COMP. LAWS ANN. § 722.623(1)

For example, the Massachusetts statute illustrates the types of professionals required to report suspected abuse.

Any physician, medical intern, hospital personnel engaged in the examination, care, or treatment of persons, medical examiner, dentist, nurse, chiropractor, podiatrist, osteopath, public or private school teacher, educational administrator, guidance or family counselor, day care worker, probation officer, social worker, foster parents, or police officers.¹⁵

Educators, as mandatory reporters are required to report suspected cases of child abuse to the proper authorities. In all states, this means contacting the state's child protective service unit or the proper law enforcement agency.¹⁶

States have created the duty to report suspected child abuse by teachers and administrators. Having created the duty, states have also encouraged reporting by enacting laws concerning the issues of liability for mandated reporters.

LEGAL IMPLICATIONS FOR MANDATED REPORTERS

Immunity

Every state's reporting statute has a clause providing some kind of immunity from prosecution for those reporting cases of suspected abuse.¹⁷ The basic argument for immunity is that no reporter should fear reprisal for performing a mandated responsibility.¹⁸ The threat or mere possibility of liability for reporting, would inhibit the reporting sought by the statute. Most reporters are, therefore, protected by a

(Supp. 1981-82); MINN. STAT. ANN. § 62B.556(3) (West Supp. 1981); MISS. CODE ANN. § 43-23-9 (Supp. 1980); MO. ANN. STAT. § 210.115(1) (Vernon Supp. 1981); MONT. REV. CODES ANN. § 10-1304 (Supp. 1977); NEB. REV. STAT. § 28-1501 (1975); NEV. REV. STAT. § 200.502(2)(d) (1979); N.H. REV. STAT. ANN. § 169-C:29 (Supp. 1979); N.J. STAT. ANN. § 9:6-8.10 (West 1976); N.M. STAT. ANN. § 32-1-15(A) (Cum. Supp. 1980); N.C. GEN. STAT. § 7A-543 (Supp. 1979); N.D. CENT. CODE § 50-25.1-03 (Supp. 1979); N.Y. SOC. SERV. L. tit. 6 § 413 (McKinney 1976 & Supp. 1980-81); OHIO REV. CODE ANN. § 2151.42.1 (Page Supp. 1980); OKLA. STAT. ANN. tit. 21, § 846(A) (West Supp. 1980-81); OR. REV. STAT. §§ 418.740.750 (1979); PA. STAT. ANN. tit. 11, § 2204(c) (Purdon Supp. 1981-82); R.I. GEN. LAWS § 40-11-3 (Supp. 1980); S.C. CODE § 20-10-50 (Supp. 1980); S.D. CODIFIED LAWS ANN. § 26-10-10 (1976); TENN. CODE ANN. § 37-1203 (Supp. 1980); TEX. FAM. CODE ANN. § 34.01 (Vernon 1975 & Supp. 1980-81); UTAH CODE ANN. § 33 (Supp. 1983); VA. CODE § 26.44.030(1) (Supp. 1981); W. VA. CODE § 49-6A-2 (1980); WIS. STAT. ANN. § 48-981(2) (West 1979); WYO. STAT. § 14-3-205 (1977).

15. See, MASS. GEN. LAWS ANN. ch. 119, § 51A (West 1980).

16. See, Kohlman *supra* note 4 at 120 (1974).

17. See, Schwartz, *Child Abuse and Neglect: A Survey of the Law*, MEDICAL TRIAL QUARTERLY 293, 310 (1980).

18. *Id.* at 311.

qualified immunity for liability, either civil or criminal, if they report in good faith and without malice. The good faith of any mandated reporter is presumed in most reporting statutes.¹⁹

Failure to Report

The concept of mandatory reporting is meaningless if the law provides no means of enforcement. Therefore, states have enacted penalties for mandatory reporters who fail to report cases of suspected child abuse. States, however, have not enacted uniform liability clauses. Thirty-two states impose criminal liability,²⁰ and only five states have made provisions for civil liability.²¹ Twelve states have created a duty to report but have not specified a penalty for breach of that duty.²² Michigan is the only state to adopt a negligence standard as the basis for liability.²³ The other states which recognize civil liability require proof of willful misconduct.²⁴ In such an action, willful misconduct is defined to mean "that the actor has intentionally done an act of unreasonable character in disregard of a risk known to him . . . or so great that as to make it highly probable that harm would follow."²⁵

19. Schwartz, *supra* note 17 at 312.

20. See, ALA. CODE § 26-14-13 (1975); ARIZ. REV. STAT. ANN. § 13-3619 (1978); ARK. STAT. ANN. § 42-816(a) (1977); CAL. PENAL CODE § 11162 (West 1970); COLO. REV. STAT. § 19-20-104(a) (1978); FLA. STAT. ANN. § 827.07(18) (West Supp. 1981); GA. CODE ANN. § 74-111(d) (Supp. 1980); IND. CODE § 31-6-11-20 (Supp. 1980); IOWA CODE ANN. § 232.75(1) (West Supp. 1981-82); KAN. STAT. ANN. § 38-720 (Supp. 1980); KY. REV. STAT. § 199.990(7) (Supp. 1980); LA. REV. STAT. ANN. § 14:4031 (West 1974 & Supp. 1981); MICH. COMP. LAWS ANN. § 722.633(2) (Supp. 1981-82); MINN. STAT. ANN. § 62B.556(6) (West Supp. 1981); MO. ANN. STAT. § 210.165 (Vernon Supp. 1981); NEB. REV. STAT. § 28-15 (1975); NEV. REV. STAT. § 200.507 (1979); N.H. REV. STAT. ANN. § 169-C:39 (Supp. 1979); N.J. STAT. ANN. § 9:6-8.14 (West 1976); N.M. STAT. ANN. § 32-1-15(F) (Cum. Supp. 1980); N.Y. SOC. SERV. LAW tit. 6 § 420(1) (McKinney 1976); N.D. CENT. CODE § 50-25.1-13 (Supp. 1979); OKLA. STAT. ANN. tit. 21, § 846(A) (West Supp. 1980-81); PA. STAT. ANN. tit. 11, § 2212 (Purdon Supp. 1981-82); R.I. GEN. LAWS § 40-11-6.1 (Supp. 1980); S.C. CODE § 20-10-190 (Supp. 1980); S.D. CODIFIED LAWS ANN. § 26-10-10 (1976); TENN. CODE ANN. § 37-1212 (Supp. 1980); TEX. FAM. CODE ANN. § 34.07 (Vernon Supp. 1980-81); UTAH CODE ANN. § 78-3b-10 (Supp. 1979); WASH. REV. CODE ANN. § 26.44.090 (Supp. 1981); W. VA. CODE § 49-6A-8 (1980).

21. See, ARK. STAT. ANN. § 42-816(b) (1977); COLO. REV. STAT. § 19-10-104(b) (1978); IOWA CODE ANN. § 232.75(2) (West Supp. 1981-82); MICH. COMP. LAW ANN. § 722.633(1) (Supp. 1981-82); N.Y. SOC. SERV. LAWS § 420(2) (McKinney 1976).

22. These states are Alaska, Hawaii, Idaho, Illinois, Maine, Maryland, Mississippi, Montana, North Carolina, Ohio, Oregon, and Wyoming.

23. See, MICH. COMP. LAWS ANN. § 722.633(1) (Supp. 1981-82).

24. See, ARK. STAT. ANN. § 42-816(b) (1977); COLO. REV. STAT. § 19-10-104(b) (1978); IOWA CODE ANN. § 232.75(1) (West Supp. 1981-82); N.Y. SOC. SERV. LAW § 420(2) (McKinney 1976).

25. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 185 (4th ed. 1971).

In many states, "reasonable cause to believe"²⁶ creates the obligation to report, while other states require "cause to believe"²⁷ or require "reasonable cause to know or suspect."²⁸ There is little difference in the intent of these statutes: teachers are required to report when they should suspect a child is abused. The standard is an objective one. Other states, however, have adopted a subjective standard of care, creating a duty to report when a mandated reporter actually "knows or suspects" abuse.²⁹

In general, a teacher or administrator who suspects a child is being abused is obligated to report it. Failure to report may lead to civil or criminal liability. Most statutes which include penalty clauses classify failure to report as a misdemeanor usually punishable by up to one year in prison or a \$500 to \$1,000 fine or both.³⁰ Those mandated to report are probably more vulnerable to civil suits for their failure to report than to criminal prosecution.³¹ If a child who is abused and unreported is one of a class of persons which a criminal statute was intended to protect, a violation may permit a claim for civil damages in any event. In some states, the violation would constitute negligence per se,³² which in others it would be necessary to prove that the failure to report was also the proximate cause of the plaintiff's injury.³³

The immunity and penalty provisions serve as the primary statutory methods for encouraging reporting. Although these mandates have contributed to an increase in reporting, full compliance and cooperation from teachers and administrators has not been forthcoming.³⁴ Of

26. See, e.g., ILL. ANN. STAT. ch. 23, § 2054 (Smith-Hurd Supp. 1980-81); KY. REV. STAT. § 199.335 (Supp. 1980) and OR. REV. STAT. § 418.750 (1979).

27. See, e.g., ALASKA STAT. § 47.17.020 (1979); GA. CODE ANN. § 74-111(a) (Supp. 1980); TEX. FAM. CODE ANN. § 34.01 (Vernon 1975).

28. See, e.g., COLO. REV. STAT. § 19-10-104 (1978); See also N.Y. SOC. SERV. LAW tit. 6 § 413 (McKinney 1976 & Supp. 1980-81).

29. See, e.g., CAL. PENAL CODE § 11165.66 (West Supp. 1981); DEL. CODE ANN. tit. 16 § 903 (Supp. 1980) and N.M. STAT. ANN. § 32.1-15 (Supp. 1980).

30. See, e.g., ARIZ. REV. STAT. ANN. § 13-3619 (1978); COLO. REV. STAT. § 19-10-104(4)(a) (1978); MO. ANN. STAT. § 210.165 (Vernon Supp. 1981) and N.Y. SOC. SERV. LAW tit. 6, § 420 (McKinney 1976 & Supp. 1980-81).

31. Prosecutors have not been willing to initiate criminal proceedings against non-reporting professionals. Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse*, 12 AM. CRIM. L. REV. 103, 115 (1974). See also Schwartz, *Child Abuse and Neglect*, *supra* note 17 at 312.

32. See, e.g., MICH. COMP. LAWS ANN. § 722.633(1) (Supp. 1981-82). See also, Schwartz, *Child Abuse and Neglect*, *supra* note 17 at 312.

33. See, e.g., N.Y. SOC. SERV. LAW tit. 6, § 420 (McKinney 1976 & Supp. 1980-81).

34. See, Sussman, *supra* note 3 at 270-71. Unlike other mandated reporters teachers have consistently failed to recognize and report suspected child abuse. E.g., New York State reported that during 1972 only 10% of reports were filed by educators when over 50% of abused children are of school age. See New York Reports of Alleged Child Abuse and Maltreatment by Reporting Source, 1982 (SCR No. 401 Report). See also, Michigan Children's Protective Services Management Information, Report P.S. 311 (1980). Only 7% of all reported child abuse were filed by educators.

the total reported cases of child abuse last year, educators were responsible for approximately ten percent of the reports.³⁵

Some professionals argue that the dearth of reporting is due to the lack of enforcement of the mandatory reporting laws.³⁶ There is not a single recorded case finding teachers or administrators in non-compliance.³⁷ Other professionals, however, believe the low incidence of reporting is due to educators lack of information about the law, and familiarity with the physical and behavioral indicators that are often associated with abused children.

IDENTIFYING THE ABUSED CHILD

Educators are potentially a major resource for helping to identify abused children. They are in a unique position to observe children on a daily basis over extended periods of time and to communicate with them regularly. Consequently, teachers and administrators need to know the physical and emotional indicators that are often associated with abused children.

The following should be viewed as indicators of the possibility of abuse. The presence of one or more of these indicators does not necessarily imply that abuse has occurred, it should, however, alert the teacher to the possibility that abuse existed.

Physical and Behavioral Indicators of Child Abuse

Physical

- Unexplained bruises and welts that may indicate physical abuse: on face, legs, mouth; on torso, back, thighs; in various stages of healing; clustered, forming regular patterns; reflecting shape of article used; regularly appear after absence, weekend, or vacation
- Unexplained burns that may indicate abuse: cigarette burns; immersion burns indicating dunking in a hot liquid; rope burns that indicate confinement; dry burns indicating that a child has been forced upon a hot surface, or has had a hot implement applied to the skin

35. *Id.* See also 1982 Findings of the National Center on Child Abuse and Neglect, U.S. Department of Health and Human Services.

36. See Comment, *Civil Liability for Failing to Report Child Abuse*, *supra* note 5 at 136. See also Aaron, *Civil Liability for Teachers' Negligent Failure to Report Suspected Child Abuse*, 28 WAYNE L. REV. 183, 185-86 (1982).

37. Action has been taken against physicians and others, however, for failure to report or diagnose suspected child abuse. See, *Landeros v. Flood*, 551 P.2d 389 (Cal. 1976); *Mammo v. Arizona*, 24(2) A.T.L.A.J. (Ariz. 1981), *City of Jacksonville v. Florida First Nat'l Bank*, 339 So. 2d 632 (Fla. 1976).

- Unexplained lacerations or abrasions that may indicate abuse: lacerations of the lips, eyes, gums, or any portion of an infant's face; any laceration or abrasion to external genitalia
- Unexplained skeletal injuries that may indicate abuse: to skull, nose, facial structure; in various stages of healing; multiple or spiral fractures
- Unexplained head injuries that may indicate abuse: unexplained hair loss and/or hemorrhaging beneath the scalp; subdural hematomas; retinal hemorrhages or detachments

Behavioral

- Wary of adult contacts
- Apprehensive when other children cry
- Behavioral Extremes: aggressiveness or withdrawal
- Frightened of parents
- Afraid to go home
- Reports abuse by parents or guardian

Sexual Abuse

Physical

- Difficulty in walking or sitting
- Torn, stained, or bloody underclothing
- Pain or itching in genital area
- Bruises or bleeding in external genitalia, vaginal, or anal areas
- Venereal disease in pre-teens
- Pregnancy, especially in pre-teens

Behavioral

- Poor peer relationships
- Withdrawal, fantasy, or infantile behavior
- Bizarre, sophisticated, or unusual sexual behavior or knowledge in young children
- Delinquent or run away
- Reports of sexual abuse by parent or guardian³⁸

The above indicators should be considered when teachers and administrators are concerned about a child having been abused. Of course, each indicator can have a reasonable explanation, however,

38. See, Lauer, *The Role of the Mental Health Professional in the Prevention and Treatment of Child Abuse and Neglect*, National Center on Child Abuse and Neglect, U.S. Department of Health and Human Services, Pub. No. 79-30194 (1979).

when viewed in relation to the child and his or her particular circumstances, these physical and behavioral indices should provide educators with the necessary information to determine whether or not to suspect abuse.

In order to assist educators confronted with the issue of child abuse, school district policy and procedures should be developed. A policy regarding child abuse demonstrates to the community a commitment to confront the problem of child abuse. The ultimate purpose of such a policy is to protect children whose health and welfare are threatened.

The suggestions that follow are designed to assist education policy makers develop and implement effective child abuse policies and procedures.

Suggested Elements in a School District Policy

- A brief rationale for involving school personnel in reporting
- The title and appropriate section numbers of the state reporting statute
- A statement of school board support for reporting suspected child abuse
- Who is mandated to report
- The law defining reportable conditions of child abuse
- The person or agency to receive reports
- The information required of the reporter
- Whether or not there is immunity from criminal penalty or from civil liability for those who report
- The penalty for failure to report established by state law
- The action which will be taken by the school board for failure to report
- Any provisions of the law regarding the confidentiality of reporters or of records pertaining to report of suspected abuse
- Copy of form which must be used on filing child abuse reports
- The identifiable physical and behavioral indicators of abuse
- Community resources which educators can use in responding to child abuse cases³⁹

CONCLUSION

Child abuse and neglect is not a new phenomenon. What is new is society's willingness to confront the problem. Educators can and must

39. See, State Education Department of New York, Child Abuse and Neglect A Resource Package for School Policy (1982).

play a leadership role in protecting the health and welfare of children. Teachers and administrators unlike other professionals, see children on a daily basis. They observe how children interact with their peers and adults, and have some basis for judging a child's behavior against the norms of the group and against the child's own history. This unique position provides educators with an opportunity to detect abuse and neglect that is uncqualed.

Educators must be provided with the knowledge to enable them to identify suspected abuse and neglect. Furthermore, school boards must make it clear that they support the efforts of teachers and administrators who report suspected child abuse and neglect. Reporting suspected cases of abuse and neglect certainly does not ensure that the situation will improve. Not reporting, however, ensures that if the abuse or neglect exists the child will continue to be at risk.

Private Schools' Tax Exempt Status and Application of Section 1983

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The evolutionary adaptation of law to new situations is nowhere better illustrated than in the history of Section 1983 of the Civil Rights Act. Originally enacted in 1871 as a federal attempt to counteract state inaction toward terrorism of blacks, Section 1983 stated:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.¹

Early interpretation of Section 1983 exhibited a restrictive judicial attitude dedicated more to the preservation of states' rights than protection of individual rights.² The vacuum created by an apparent

1. 42 U.S.C. § 1983 (1976).

2. *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133-1161 (1977).

judicial insouciance was filled by a proliferation of state Jim Crow laws that effectively disenfranchised blacks and halted their social, economic and political advancement. A more sympathetic judicial treatment of Section 1983 during the depression years with some damage awards against government officials who, under color of state law, prevented blacks from voting nonetheless produced only 280 Section 1983 suits being filed in federal courts prior to 1960.³ The extent of the civil rights litigation explosion is evidenced by the filing of 13,000 Section 1983 suits in 1980 alone.⁴

Because of the nature of public schools as agencies of state governments, Section 1983 actions became a frequent and popular media to remediate alleged substantive and procedural wrongs. In *Wood v. Strickland*⁵ the United States Supreme Court advanced both an objective and subjective test to determine liability for school officials who violated the constitutional rights of students. In *Carey v. Piphus*⁶ the Court required that there could be no compensatory damages against school officials under Section 1983 for procedural violation unless plaintiffs could prove actual damages. Numerous federal and state cases have addressed a myriad variety of problems pertaining to public school teacher and student rights under Section 1983.⁷ The ruling in *Maine v. Thiboutot*⁸ that Section 1983 included not only civil rights laws, but any federal law, has generated considerable litigation within the public sector regarding the interaction between Section 1983 and federal and state statutes protecting classes of persons based on such categories as age, sex, race, religion, and handicap.⁹

The popularity of Section 1983 as a vehicle to litigate alleged injustices can be attributed to several procedural advantages of that section over other statutes which can be the basis for a civil rights claim.

(1) Section 1983 contains no statute of limitation of its own so federal courts look to state law for limitations on similar actions in a state forum. Although statutes of limitation will vary from one

3. Cambron-McCabe, *School District Liability*, 10 NOLPE SCH. L.J. 99, 100 (1982).

4. Annual Report of the Director of the Administrative Office of the United States Courts (1980).

5. 420 U.S. 308 (1975).

6. 435 U.S. 247 (1978).

7. E.g., *Stoddard v. School Dist. No. 1*, 590 F.2d 829 (10th Cir. 1979).

8. 448 U.S. 1 (1980); See also *District No. 1, Weston Cty. v. Holso*, 584 P.2d 1009 (Wyo. 1978); *Kingsville Indep. School Dist. v. Cooper*, 611 F.2d 1109 (5th Cir. 1980); *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980), cert. denied, 101 S. Ct. 3015 (1981).

9. See, *McCroan v. Bailey*, 543 F. Supp. 1201 (S.D. Ga. 1982); *Hadley v. Moffat Cty. School Dist.*, 641 P.2d 284 (Colo. Ct. App. 1981); *Meyerson v. State of Arizona*, 528 F. Supp. 129 (D. Ariz. 1981).

state to another¹⁰ they are invariably longer than a Title VII action where a complaint must be filed with the EEOC within 180 days and if EEOC has recognized a state or local "deferral agency" the complaint must be filed with the deferral agency within 240 days.¹¹

(2) A Section 1983 action does not require exhaustion of administrative remedies¹² whereas a Title VII would require such exhaustion of remedies.¹³

(3) Section 1983 allows greater remedies in some situations. Section 1983 permits compensatory and punitive damages as well as equitable relief¹⁴ whereas Title VII is explicitly limited to two years back pay, injunctive relief, other appropriate injunctive relief and attorney's fees.¹⁵

(4) Section 1983 has fewer procedural requirements than exist under other remedial statutes. Although a Title VII claim can be supported by allegations of "disproportionate impact"¹⁶ rather than the discriminatory purpose required under Section 1983,¹⁷ Title VII requires filing of a claim within 180 days, submitting to reconciliation by EEOC and receiving a right to sue letter before proceeding in federal court.¹⁸ Under Title IX some jurisdictions impose a program-specific requirement before a sex discrimination claim can be entertained.¹⁹

It was probably inevitable that success of Section 1983 actions against public schools should have led to attempts to extend Sections 1983 to nonpublic schools. In *Bright v. Isenbarger*,²⁰ a federal district court categorically rejected the use of Section 1983 as a remedy for reinstatement by a student expelled from a Catholic school. The court supported its conclusion by observing that the United States Supreme

10. *E.g.*, *Beard v. Stephens*, 372 F.2d 685 (5th Cir. 1967) (6 years); *Beyer v. Werner*, 299 F. Supp. 967 (D.C.N.Y. 1969) (3 years); *Funk v. Cable*, 251 F. Supp. 598 (D.C. Pa. 1966) (2 years).

11. 42 U.S.C. § 2000e-5(b), (e).

12. *McNeese v. Board of Educ.*, 373 U.S. 676 (1968).

13. *Rohler v. TRW Inc.*, 576 F.2d 1260 (7th Cir. 1978).

14. *Harkless v. Sweeney Indep. School Dist.*, 427 F.2d 319 (5th Cir. 1970); *Batista v. Weir*, 340 F.2d 74 (3d Cir. 1965).

15. 42 U.S.C. § 2000e-5(g). However Title VII is available against any local, state or federal employer whereas only injunctions can be secured under Section 1983 against state employers unless the eleventh amendment immunity is waived and no action can be brought against the federal government because of the state action requirement.

16. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

17. *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979).

18. 42 U.S.C. § 2000e-5(c), (e).

19. *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376 (E.D. Mich. 1981); *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982); *Contra, Grove City College v. Harris*, 500 F. Supp. 253 (W.D. Pa. 1980), *aff'd*, 687 F.2d 684 (3d Cir. 1982).

20. 314 F. Supp. 1382 (N.D. Ind. 1970).

Court had already affirmed the pluralistic nature of our society including the methods of education²¹ and that there was not significant involvement between the school and the state. The court noted that "almost everything we do is in part the product of or is facilitated by some State action" but Section 1983 cannot be invoked as a remedy unless the state and nonpublic school involvement insinuates the state "into a position of interdependence with the school [so] that it must be recognized as a point participant in the challenged activity."²² The two elements of state-school involvement, general state supervision of the quality of education and property tax exemption, were held not to implicate the state with the school's management functions since control of educational quality and availability of tax exempt status apply to a broad range of nonprofit organizations. The *Bright* court considered state action under Section 1983 to be identical in scope to state action under the fourteenth amendment; as part of its dicta the court observed that almost all applications of the fourteenth amendment to private conduct had involved an attack upon private racial discriminations and there were no allegations of racial discrimination in the complaint.

In *Huff v. Notre Dame High School*²³ a federal district court refused to permit Section 1983 to be used to impose constitutional procedural due process standards upon a nonpublic school in a case involving a student expulsion. The court considered two theories by which private action was deemed to constitute state action: state entanglement theory and the state function theory.

The state entanglement theory was supported by claims that defendant private school received aid from various levels of government and that the school was regulated by state and local officials. The court dismissed financial aid as a basis for entanglement because only 1.59 percent of the school's budget came from services, equipment and materials from various governmental sources. The court specifically rejected tax exemption as a form of entanglement because tax exemption does not "dictate or influence the administration of [school] affairs."²⁴ State and local regulatory schemes, such as qualification of teachers and fire codes, were rejected because the state or local government was only exercising its legitimate interest in protecting children.

The state function theory, with its claim "that state action is present when a private individual or group performs a function normally

21. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

22. See, *supra* note 20 at 1384.

23. 456 F. Supp. 1145 (D. Conn. 1978).

24. *Id.* at 1148.

associated with governmental activity,"²⁵ was likewise disposed of by the *Huff* court. The court made two interesting observations in disposing of the state function argument: that first amendment establishment clause problems might develop if a church-sponsored private school was deemed to be the state and that if all private schools were deemed to be the state the difficult problem of aid to parochial schools would not exist.²⁶

The United States Supreme Court has recently addressed the relationship of Section 1983 to a nonprofit, private school in *Rendell-Baker v. Kohn*.²⁷ *Rendell-Baker* involved five teachers and one vocational counselor at a private school for maladjusted high school students who alleged that they were discharged as a result of exercising their first amendment rights of free speech.²⁸ The sole issue before the Court was whether defendant school acted under color of state law so as to be subject to Section 1983. Virtually all of the students in defendant school were referrals from public school districts and the state drug rehabilitation division who were not able to handle the drug, alcohol or behavioral problems of the students. State and federal funds accounted for at least 90 percent of defendant's operating budget. Eligibility for state funding required compliance with a variety of regulations common to all schools such recordkeeping, student-teacher ratios, maintenance of job descriptions and written statements describing personnel standards and procedures. However, except for requirements such as equal employment opportunity and state approval of initial hiring decisions to insure compliance with state qualifications, defendant school conducted the actual personnel interviews.

In sustaining the dismissal of plaintiffs' complaints against defendant school the Court addressed both the entanglement and state function theories. In rejecting the entanglement theory the Court observed that "the relationship between the school and its teachers and counselors is not changed because the state pays the tuition of the students."²⁹ The Court further observed that "the decisions to discharge the petitioners were not compelled or even influenced by any state regulation."³⁰ The absence of extensive personnel regulations commensurate with the extensive regulations in other areas and the requirement of approval only

25. *Id.* at 1149.

26. *Id.* at 1150.

27. 102 S. Ct. 2764 (1982).

28. Plaintiff vocational counselor was allegedly discharged after petitioning the school's board for greater responsibilities for the student staff counsel and the five teachers were dismissed after their letter to the editor was printed protesting the school's prohibition on picketing.

29. *See, supra* note 27 at 2771.

30. *Id.* at 2772.

of persons hired as vocational counselors were "not sufficient to make a decision to discharge, made by private management, state action."³¹

With regard to plaintiff's argument of public function the Court declared that the question is not whether a private group serves a public function but "whether the function performed has been traditionally the *exclusive* prerogative of the State."³² Since the state of Massachusetts had not sought to make the education of maladjusted high school students an exclusive state function there could be no state action.

The court also disposed of a final plaintiffs' argument that a symbiotic relationship existed between defendant and the state similar to the relationship in *Burton v. Wilmington Parking Authority*³³ where the refusal of a restaurant located in a public parking garage to serve Negroes constituted state action. The restaurant's argument that it would lose profits if it did not discriminate was seen as evidence that the state profited from the restaurant's discriminatory actions and the state would thus be viewed as also discriminatory. The Court concluded in *Rendell-Baker* that "the school's fiscal relationship with the State is not different from that of many contractors performing services for the government."³⁴

The *Rendell-Baker* Court left open several questions that it did not have to answer. Since state funds were used to pay student tuition, might the result have been different if students rather than faculty had been dismissed and then sued under Section 1983? If defendant private school had violated specific state regulations regarding permissible methods of discipline for maladjusted juveniles by utilizing a form of discipline specifically prohibited would such action support a Section 1983 action on the theory that there is "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself?"³⁵ Would the result in *Rendell-Baker* have been different had the staff dismissals been accomplished on a racially discriminatory basis?³⁶ With very little direct guidance from the Court the answer to all three questions in the future might be "Yes."

31. *Id.*

32. *Id.* (emphasis is that of the Court).

33. 365 U.S. 715 (1961).

34. See, *supra* note 27 at 2772.

35. *Id.* at 2765.

36. Of course, if there were charges of racial discrimination then a cause of action would probably exist under Title VII of the Civil Rights Act, but as has been noted earlier Title VII offers limited remedies that may not be acceptable to an injured plaintiff.

It may be that some of the unanswered questions in *Rendell-Baker* may have been brought into sharper focus by the recent Supreme Court decision of *Bob Jones University v. United States*.³⁷

Although not a Section 1983 case *Bob Jones* offers some insights into the relationship between the federal government and private schools. In the Court's upholding of IRS denial of tax exemption to two religious educational institutions for racial discrimination in admissions or dating practices it is important to understand what *Bob Jones* did not hold. The Court's decision applied only to IRS not to state departments of revenue; presumably states would still be free to grant tax-exempt status to private schools that discriminated on racial grounds. The Court's decision was limited to denial of federal tax exemption only violation of "established public policy,"³⁸ in the case of *Bob Jones University*, racial discrimination; there was no indication that other forms of discrimination, such as that based on sex or religion, are elevated to the same place as race where there is "no doubt that [they] violate fundamental public policy."³⁹ The Court did not eliminate Free Exercise of Religion as a constitutionally permissible basis for certain kinds of discrimination;⁴⁰ any sanctions such as denial of tax exemption would be permissible as long as they "will not prevent [the] schools from observing their religious tenets."⁴¹

On the other hand, the *Bob Jones* Court made several points abundantly clear. At that point in time when there is no doubt that an established public policy exists on a certain subject the governmental interest is considered to be compelling and Free Exercise of Religion will be no defense to governmental sanctions. Tax exemption is not an inviolate right that cannot be denied to any educational institutions whether religious or nonreligious. The creation of fundamental public policy is not the sole prerogative of Congress and an administrative agency such as IRS can now declare public policy subject to reversal by Congress; courts, of course, have frequently declared public policy.⁴²

What *Bob Jones* leaves unclear is whether violation of a fundamental public policy itself will constitute sufficient nexus for state action. The Fourth Circuit Court of Appeals in *Bob Jones* observed that tax

37. 103 S. Ct. 2017 (1983).

38. *Id.* at 2026.

39. *Id.* at 2032.

40. One example might be restriction of women into areas of the ministry. See, e.g., EEOC v. Southwestern Baptist Theological Seminary, 485 F. Supp. 255 (N.D. Tex. 1980).

41. See, *supra* note 37 at 2035.

42. E.g., *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (prohibition of racial discrimination in public education).

exemption was "a kind of monetary benefit"⁴³ and the Supreme Court appeared to strengthen that observation by declaring that no educational institutions practicing racial discrimination "should be encouraged by having all taxpayers share in their support by way of special tax status."⁴⁴ The Court also pointedly declared that, "When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vacarious 'donors.'"⁴⁵

As has been noted earlier, one of the reasons in the past for not considering tax exemption to constitute state action has been that tax exemption does not insinuate the state "into a position of interdependence with [the school so] . . . that it must be recognized as a joint participant in the challenged activity."⁴⁶ The *Bob Jones* majority appears to have altered the traditional rationale because the continuance of tax exemption is considered to make the government a "joint participant" with the objectionable racial discrimination.

If tax exemption is now viewed as an instrument to direct or alter school matters that are violative of fundamental public policy, then it would seem that an interdependence possibly does exist between the government and a private school to constitute state action. Presumably the state action nexus would apply only to those areas where a fundamental public policy exists. The *Bob Jones* majority had little difficulty in finding a fundamental public policy where there was an extensive history of judicial decisions, congressional statutes and executive orders opposing racial segregation in the public sector.⁴⁷ It is by no means clear that withholding a governmental benefit such as tax exemption where a fundamental public policy is at stake is equivalent to a finding of state action to support a Section 1983 action against such a school. For example, if a state failed or refused to deny state tax exemption to racially segregated private schools would such failure or refusal amount to state involvement with the school for state action purposes? And even if state action did exist would it support a Section 1983 action only involving racial discrimination or could students or faculty at the private school also use Section 1983 to assert the full panoply of constitutional rights available to their counterparts in the public sector?

A recent federal bankruptcy case may shed some light on how fluid the concept of state action has become and how easily it can be

43. *Bob Jones University v. United States*, 639 F.2d 147, 152 (4th Cir. 1980).

44. See, *supra* note 37 at 2030.

45. *Id.* at 2028.

46. See citation, *supra* note 20.

47. See, *supra* note 37 at 2029-30.

circumvented. In *In re Parkman*⁴⁸ a student at a private university had been dismissed from a doctoral program because she refused to accelerate her tuition arrearage payment schedule arranged under a Chapter 13 debtor's plan. The student sought reinstatement under Section 525 of the Bankruptcy Code which prohibits "a governmental unit" from discriminating against persons based upon actions taken by her under the Bankruptcy Act. In ordering reinstatement of the student the bankruptcy judge overcame the state action requirement by declaring "where the actions of a private institution such as withholding a transcript are really tools to collect a discharged debt or a debt provided for under a plan, debtors are denied the fresh start contemplated by Congress in enacting the Bankruptcy Code."⁴⁹ If any act of Congress purporting to preempt a field, such as the Bankruptcy Code does, is equally applicable to private schools regardless of any state action requirement then it would appear that such federal laws as Section 1983, the Civil Rights Acts and the handicapped statutes would be applicable to private schools, at least to the extent that the absence of state action prevents their application today. The *Parkman* rationale would render largely irrelevant a determination whether the area at issue involves a fundamental public policy.

There is a possibility that the nature of the remedy sought will affect the applicability of state action to a private school. Withdrawal of tax exemption, however devastating that may be to the financial life of an educational institution, is significantly different in legal effect from permitting injured plaintiffs to successfully sue an institution or its individual faculty members for violations of constitutional or federal statutory rights⁵⁰ under Section 1983. If private schools and their faculties can be sued under Section 1983, will the same rules pertaining to liability and immunity for public schools likewise be imposed upon the private schools? There is no reason to believe that the qualified immunity available to government officials would not also afford similar immunity to officials of nonpublic schools. In *Wood v. Strickland*⁵¹ the Supreme Court noted in a student discipline case that a public school official is liable

if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action

48. 27 BANKR. REP. 460 (N.D. Ill. 1983).

49. *Id.* at 462.

50. In *Maine v. Thiboutot*, 448 U.S. 1 (1980) the Court determined that "and laws" embraces any statutory right raising a concern for schools whether Section 1983 can be used to assert claims under such federal acts as the Education for All Handicapped Act of 1975, Elementary and Secondary Act of 1965, Comprehensive Employment and Training Act of 1978, Family Educational Rights and Privacy Act of 1974, and many others.

51. 420 U.S. 308 (1975).

with the malicious intention to cause a deprivation of constitutional rights or other injury.⁵²

On the other hand, the Court held that a governmental unit, as opposed to the officials within that unit, has no immunities or defenses to a Section 1983 action.⁵³ However, in *City of Newport v. Fact Concerts, Inc.*⁵⁴ the Court held that there was no justification in history or public policy for permitting punitive awards against local governments for the reasons that such damages are "in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill."⁵⁵

It could be argued though that extension of Section 1983 liability to private schools would not necessarily entitle private schools to the immunities enjoyed by the public sector. If developments within the tort liability field can be used as a meaningful barometer of comparison between public and nonpublic school areas, the partial or total abrogation of tort immunity has been somewhat parallel but for differing reasons. Public school tort liability is not infrequently limited by the amount of liability insurance coverage of the public school district,⁵⁶ the concern being that essential governmental services might be restricted or taxpayers unduly penalized by uninsured judgments. However, the reason for partial or abolition of total charitable immunity in most states has been keyed to the awareness that charities are no longer low-budget, marginal operations but are large operations with hundreds or thousands of employees.⁵⁷

The differences between public and nonpublic schools would certainly mean that state statutes limiting tort liability for public schools or requiring public school board indemnification of employees⁵⁸ would not apply to nonpublic schools. But they should not affect nonpublic schools differently from public schools in Section 1983 actions because neither statutory nor common law immunity protect public school board members or school officials from liability in federal civil rights actions.⁵⁹

Another concern for certain nonpublic schools would be whether Section 1983 could create rights in situations where other federal laws

52. *Id.* at 322.

53. *Owen v. City of Independence*, 445 U.S. 622 (1980). Punitive damages are available against officials, *Patton v. Fa Prade*, 524 F.2d 863 (3d Cir. 1975).

54. 101 S. Ct. 2748 (1981).

55. *Id.* at 2760.

56. *See, e.g.*, MINN. STAT. § 466.01.

57. *Foster v. Roman Catholic Diocese of Vermont*, 70 A.2d 230 (Vt. 1950); *Adkins v. St. Francis Hosp.*, 143 S.E.2d 154 (W. Va. 1965); *Parker v. Port Huron Hosp.* 105 N.W.2d 1 (Mich. 1960).

58. *E.g.*, ILL. REV. STAT. ch. 122, § 10-20.20.

59. *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Luker v. Nelson*, 341 F. Supp. 111 (N.D. Ill. 1972).

grant exemptions. For example, Title VII⁶⁰ and Title IX⁶¹ each have exemptions for certain religious practices that might otherwise be considered in violation of the statutes. To date courts have consistently held that the authority of Section 1983 is jurisdictional only and it creates no new substantive rights.⁶² Thus the religious exemptions would remain intact subject only to revision by Congress. Presumably, other federal or state statutes which are keyed to reception of federal or state financial assistance⁶³ would prohibit Section 1983 actions where relevant financial assistance is not received.

The greatest concern about the applicability of Section 1983 to nonpublic schools, however, transcends the actual mechanics of how that section applies to such schools. Regardless whether Section 1983 is held to apply if tax exemption is now sufficient nexus for state action, or if a fundamental public policy is at issue thus invoking a form of state action, or if a preemptive federal statute is at issue, the effect may well be the evisceration of the distinctions of nonpublic school education. In private education the relationship between the school and the parents of minor students or the school and students who have reached their legal age of majority or the school and faculty is generally recognized to be one of contract.⁶⁴ Contract theory has been used to sustain many ways in which private school officials have dealt with faculty and students even though similar conduct in the public sector would have faced serious due process attacks.⁶⁵ Nonpublic schools have been able to restrict such substantive rights as speech and press and to impose standards of conduct that would be impermissible in the public sector. In addition, nonpublic schools have been able to expel students using procedural standards less than the procedural due process requirements imposed upon public schools.⁶⁶ If the full panoply of rights imposed upon public schools were to be imposed also upon private schools, it would be difficult for many private schools to maintain any of their unique distinctives.

60. 42 U.S.C. § 2000e.

61. 20 U.S.C. § 1681-86.

62. *Hadley v. Moffat Cty. School Dist.*, 641 P.2d 284 (Colo. Ct. App. 1981); *Meyerson v. Arizona*, 526 F. Supp. (D. Ariz. 1981); *Acosta v. University of Dist. of Columbia*, 528 F. Supp. 1215 (D.D.C. 1981); *Jones v. Berdson*, 530 F. Supp. 221 (D. Miss. 1980).

63. *E.g.*, 29 U.S.C. § 794 (Rehabilitation Act of 1974); 42 U.S.C. § 2000d (Title VI); 42 U.S.C. § 6101 (Age Discrimination Act of 1975).

64. *See generally*, S. PERMUTH & R. MAWDSLEY, *THE LAW, THE STUDENT AND THE CATHOLIC SCHOOL* (1981).

65. *See, e.g.*, *Napolitano v. Princeton Univ.*, 186 N.J. Super. Ct. App. Div. 548, 453 A.2d 263 (1982); *Aronson v. North Park College*, 418 N.E.2d 776 (Ill. App. Ct. 1981); *Bischoff v. Brothers of the Sacred Heart*, 416 So. 2d 348 (La. Ct. App. 1982).

66. *Flint v. St. Augustine H.S.*, 323 So. 2d 229 (La. 1975).

On the other hand it could be argued that if nonpublic schools were to be increasingly secularized by the imposition of requirements not currently applicable to nonpublic schools, then perhaps public schools should adapt a broader concept of an open forum commensurate with the secularization of private schools.⁶⁷ To subject both public and nonpublic schools to the same substantive and procedural standards eviscerates the traditional concept of pluralism in American education.⁶⁸ A negation of a frontal assault on nonpublic education by means of Section 1983 is especially critical for religious schools since the practices of such schools have been increasingly eroded by the judicially constructed doctrine of compelling interests.⁶⁹ If Section 1983 can be applied to nonpublic schools it would be questionable whether even the compelling interest doctrine would represent any protection for such schools. The possibility of application of Section 1983 to nonpublic schools represents a clear and present danger to their very existence and should cause genuine concern to those in positions of leadership in nonpublic education.

The effect of loss of tax exemption to nonpublic schools would be serious but not necessarily disastrous. Undoubtedly there would be some attempt for individual donors to use another tax exempt organization as a conduit. In addition, the school without its tax exempt status will have to manage its finances in such a way as to reduce or eliminate taxable income, much the same way a private corporation does. However, since loss of federal tax exemption would not assure compliance with whatever public policy is at issue it would seem that a certain amount of pressure may be exerted to assure compliance. Although pressure on local and state governments to tax the nonpublic school's property and income will undoubtedly be exerted, such measures would not guarantee the compliance that successful Section 1983 damage suits would. Even the most intransigent nonpublic school would eventually have to bow to the potentially staggering financial drain of repeated civil rights actions. The alternative, namely complying with whatever public policy that is at stake, may appear equally ominous since IRS may well have the authority to monitor internal school operations to assure compliance.

67. For a discussion of the open forum concept in public schools see P. Piele & S. Pitt, *SCHOOL LAW UPDATE—1982* 1-12 (Jones, Semler eds. 1983).

68. For an excellent discussion of the necessity for genuine educational pluralism see *PRIVATE SCHOOLS AND THE PUBLIC GOOD* 19 (E. Gaffrey, Jr. ed. 1981). "The greatest degradation of poverty is the unavailability of choice."

69. States have been especially imaginative in finding compelling interest to justify state regulation. See, e.g., *Nebraska v. Faith Baptist Church*, 301 N.W.2d 571 (Neb. 1980). For the most recent U.S. Supreme Court decision see *Bob Jones Univ. v. United States*, 103 S. Ct. 2017 (1983).

Shall We Pray? The Latest Word from Legislatures and Courts

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In the first three-quarters of 1983, a considerable amount of legislative and judicial activity was initiated regarding prayer, most of which concerned the relatively new issue of "equal access" for voluntary student prayer groups and the various direct and indirect attempts to return prayer to public schools and colleges. The report herein, however, is of necessity incomplete. Quite apart from the natural inconclusivity of the prayer issue itself, the 98th Congress had been in session for less than half a term in October of 1983; and while some important judicial controversies were resolved, others were yet to be decided. But the perennial issue of the appropriate place of prayer in public life—and especially its place in the process of socialization and enlightenment called education—had already been roundly debated.

CONGRESSIONAL PRAYER INITIATIVES: 1983

In the first nine months of the 98th Congress (January-September, 1983) a total of eighteen bills and resolutions were introduced in Congress relating to prayer, periods of silence, and "equal access" for voluntary religious groups in public educational institutions. Eleven of these would affect public institutions at all levels,¹ six would affect only

1. All bills and resolutions listed in the first ten notes are from the 98th Congress, 1st Session, 1983. S. 88, S. 784, S. 785, S. 1059, S.J. Res. 73, H.R. 183, H.R. 253, H.R. 525, H.R. 2732, H.R.J. Res. 104, H.R.J. Res. 288.

public elementary and secondary schools,² and one would affect only public high schools.³ Seven of the bills and resolutions relate to voluntary prayer,⁴ four relate to equal access,⁵ and four concern both the prayer and equal access issues.⁶ An additional three measures are House concurrent resolutions, which are not legislative in nature, and therefore seek only to express the "sense of Congress" that periods of silence in public school programs (to be used for prayer, mediation, or contemplation) are not violative of the Constitution.⁷

Of the three concurrent resolutions introduced in the House, one suggests that "public school authorities should recognize the value of . . . a short period of silence to be used at the discretion of the individual student;"⁸ and two others admonish public school officials to encourage periods of silence in recognition of the "historic importance of religion to our civilization."⁹ If these concurrent resolutions were to pass both houses of Congress, they would be effective immediately. Presidential approval is not necessary.

With regard to bills and joint resolutions (which include proposed constitutional amendments), it is too early to know whether any will win approval of both houses in the remainder of the 98th Congress, which extends through 1984. By the end of September 1983, three initiatives had been reported out of the Senate Judiciary Committee and were awaiting action by the full Senate.¹⁰ Two of these, S.J. Res. 73 and S.J. Res. — (reported in unnumbered form), propose constitutional amendments that would allow for (1) "individual or group prayer in public schools" (excluding government composed prayers)¹¹ and for (2) "individual or group silent prayer or meditation" and "equal access . . . by all voluntary student groups" respectively. Three joint resolutions in the House, also proposing constitutional amendments related to school prayer, had not been reported to the full House by the end of September.¹²

The first Senate resolution proposing a school prayer amendment was introduced at President Reagan's request by Strom Thurmond, a

2. S. 425, S.J. Res. —, H.R.J. Res. 133, H.R. Con. Res. 38, H.R. Con. Res. 53, H.R. Con. Res. 76.

3. S. 815.

4. S. 88, S.J. Res. 73, H.R. 183, H.R. 253, H.R. 525, H.R.J. Res. 104, H.R.J. Res. 288.

5. S. 425, S. 815, S. 1059, H.R. 2732.

6. S. 784, S. 785, S.J. Res. —, H.R.J. Res. 133.

7. H.R. Con. Res. 38, H.R. Con. Res. 53, H.R. Con. Res. 76.

8. H.R. Con. Res. 76.

9. H.R. Con. Res. 38, H.R. Con. Res. 53.

10. S. 1059, S.J. Res. 73, S.J. Res. —.

11. Amendment added by Strom Thurmond (R-S.C.) on July 14, 1983. *Prayer Debate Shifts to Full Senate*, 41 CONG. Q. WEEKLY REP. 1465, 1465 (1983).

12. H.R.J. Res. 104, H.R.J. Res. 133, H.R.J. Res. 288, 98th Cong., 1st Sess. (1983).

Republican senator from South Carolina; the second, widely referred to as the "Hatch proposal," was also officially introduced by Thurmond. Senator Hatch's proposal evolved as a compromise measure following hearings on President Reagan's proposed amendment by the Senate Subcommittee on the Constitution, chaired by Hatch.¹³

The Senate Subcommittee, which had approved both amendments on June 9, 1983, clearly favored Senator Hatch's more moderate proposal¹⁴ because it concerned silent prayer rather than "voluntary prayer," which could be audible or silent. While at least some subcommittee members believed that President Reagan's proposal would not pass the Senate Judiciary Committee,¹⁵ Senator Thurmond said only that it had "no chance of being favorably reported" to the entire Senate.¹⁶ Senator Thurmond's prediction turned out to be correct. Although both prayer resolutions were reported out of the Judiciary Committee, neither was recommended, which was called "a setback for the school prayer movement."¹⁷

President Reagan has been the strongest supporter of recent initiatives to amend the United States Constitution, saying in his 1983 State of the Union Address that one of his four major education goals would be to seek a constitutional amendment permitting school prayer. "God should never have been expelled from America's classrooms in the first place."¹⁸ In a May radio address to the nation, he said:

We must move forward again by returning to the sound principles that never failed us when we lived up to them. Can we not begin by welcoming God back into our schools again and by setting an example for our children by striving to abide by His Ten Commandments and the Golden Rule? We've sent an amendment to the Congress that will permit voluntary prayer in school again.¹⁹

But despite the support of the Reagan administration, the Moral Majority, the Christian Broadcast Network, and others,²⁰ there has been

13. Cohodas, *Two School Prayer Measures Approved by Senate Panel*, 41 CONG. Q. WEEKLY REP. 1144, 1144 (1983).

14. School Law News, June 17, 1983, at 7-8.

15. *Two School Prayer Measures Approved by Senate Panel*, 31 CONG. Q. WEEKLY REP. 1144, 1144 (1983).

16. School Law News, June 17, 1983, at 8.

17. *Id.*, July 29, 1983, at 6.

18. Reagan, *The State of the Union Address*, delivered before a joint session of the Congress (January 25, 1983). 19 weekly compilation of Presidential Documents 105, 109 (1983). The other major goals include improvement in math and science instruction, education savings accounts, and tuition tax credits.

19. Reagan, *The President's Radio Address to the Nation on Education*, Am. Educ., May 1983, at 2.

20. Cohodas, *Senate Panel Bows to Pressure; Postpones School Prayer Vote*, 41 CONG. Q. WEEKLY REP. 1051, 1051 (1983).

considerable controversy over proposals to amend the constitution to allow for prayer, both within and outside of Congress. The ACLU, the Lutheran Council, the American Jewish Congress, and most other mainline religious groups support neither amendment.²¹ This controversy, along with lack of firm endorsement of either proposal by the Senate Judiciary Committee, makes the prospect for positive action by the full Senate uncertain.

At the end of September, 1983, while Senate consideration was pending on the alternative proposals for a constitutional amendment regarding school prayer, another religion bill was awaiting Senate action. The Equal Access Act,²² which provides that "it shall be unlawful to deny equal access to students in public schools and public colleges who wish to meet voluntarily for religious purposes," was approved by the Senate Judiciary Committee on September 15, 1983, by an eleven to four vote.²³ Although the committee rejected an amendment to eliminate elementary schools from the bill's scope, it did agree to prohibit faculty participation.²⁴ A similar bill, which includes a provision for the withdrawal of federal funds, was introduced in the House in April,²⁵ and subcommittee hearings began in June. These equal access proposals are less controversial and thus have drawn less public attention than the proposed constitutional amendments, making their prospects for passage in the 98th Congress more favorable.

While equal access bills are a relatively new phenomenon, having appeared subsequent to the Supreme Court's 1981 decision in *Widmar v. Vincent*²⁶ (mandating equal access for religious groups at the University of Missouri at Kansas City based upon freedom of speech), five of the eighteen bills introduced early in the 98th Congress illustrate the recurring attempts to limit the jurisdiction of the federal courts. Two of these, originating in the Senate,²⁷ would withdraw Supreme Court and lower federal court jurisdiction over cases involving voluntary prayer, Bible reading, and religious meetings occurring in public schools and other public buildings. Three House bills²⁸ would likewise remove federal court jurisdiction over cases concerning voluntary prayer. None of the above initiatives had been reported to the full Senate or House by the end of September.

21. *Id.* at 1144 (1983).

22. S. 1059, 98th Cong., 1st Sess. (1983).

23. *Religion and Schools*, 41 CONG. Q. WEEKLY REP. 1957, 1957 (1983).

24. *Id.*

25. H.R. 2732, 98th Cong., 1st Sess. (1983).

26. 102 S. Ct. 269 (1981).

27. S. 784, 98th Cong., 1st Sess. (1983), S. 785, 98th Cong., 1st Sess. (1983).

28. H.R. 183, 98th Cong., 1st Sess. (1983), H.R. 253, 98th Cong., 1st Sess. (1983).

Initiatives to limit federal court jurisdiction over school prayer have come primarily from Senator Jesse Helms, a North Carolina Republican, who has introduced such legislation on many occasions over the last decade.²⁹ The two identical Senate bills noted above were also introduced by Senator Helms, the first having been placed on the calendar in March,³⁰ and the second having been referred to the Senate Committee on the Judiciary in the same month.³¹ Each is called the "Voluntary School Prayer Act of 1983," and each is similar to legislation sponsored by Senator Helms in the 96th Congress and in the 97th Congress.³² The current Helms bills emphasize that jurisdictional limitations are meant to apply only to "voluntary" prayer. They are written to include "Bible reading" and "religious meetings in public schools or public buildings,"³³ representing a broadening of the intended scope of the initiatives over those introduced previously. Because more than a year remains in the 98th Congress, well over half the present term, it is possible that one or the other of these new bills will achieve equal or greater success than the 1979 Helms Prayer Bill³⁴ which passed the Senate but was never approved by the House Judiciary Committee.³⁵

Legislation relating to school prayer which was introduced early in the 98th Congress is not radically different in intent or purpose from similar legislation introduced over the last twenty years. Media attention has rightfully been drawn to the proposed constitutional amendments, as the passage of any one of them would almost certainly lead to years of public controversy over ratification. The Helms proposal,³⁶ because of its focus on silent prayer, would likely be somewhat less controversial despite its opposition by many religious and civil rights groups. No less a figure than Paul A. Freund, Professor Emeritus of Harvard Law School, suggested in October that silent prayer or

29. See McClellan, *Congressional Retraction of Federal Court Jurisdiction to Protect the Reserved Powers of the States: The Helms Prayer Bill and A Return to First Principles*, 27 VILL. L. REV. 1019 (1981-82) (arguing that selective incorporation is a usurpation of democratic decisionmaking power and inherently anti-federalist). See also, Comment, *Restoring School Prayer by Eliminating Judicial Review: An Examination of Congressional Power to Limit Federal Court Jurisdiction*, 60 N.C. L. REV. 831 (1982).

30. S. 784, 98th Cong., 1st Sess. (1983).

31. S. 785, 98th Cong., 1st Sess. (1983).

32. S. 210, 96th Cong., 1st Sess. (1979), later attached to S. 450, 96th Cong., 1st Sess. (1979); S. 481, 97th Cong., 1st Sess. (1981).

33. S. 784, 96th Cong., 1st Sess. (1983); S. 785, 98th Cong., 1st Sess. (1983).

34. S. 450, 96th Cong., 1st Sess. (1979).

35. For comments by Senator Helms regarding S. 450 and S. 481, including remarks suggesting that the Supreme Court's school prayer decisions represented a "myopic and narrow view" of constitutional history and a "distortion" of constitutional intent, see 127 CONG. REC. S1281-1284 (daily ed. Feb. 28, 1980).

36. S.J. Res. —, 98th Cong., 1st Sess. (1983).

meditation might prove to be constitutional. "If one thinks of it as a free-exercise rather than an establishment problem turning on psychological coercion, a silent prayer not in unison, accompanied by other forms of private meditation, would not offend the Constitution."³⁷

Of more immediate concern is the likelihood of passage of one of the equal access bills or one of the bills seeking to limit federal court jurisdiction over school prayers or prayer group meetings. As has been noted above, an equal access bill will probably be considered by the full Senate in the near future,³⁸ and hearings have been held on a similar bill in a House subcommittee.³⁹ Both would apply at all educational levels, with the Senate bill giving federal district court jurisdiction and the House bill providing for the withdrawal of federal funds.

From a practical point of view, public university students are already assured of equal access (at least if religious groups do not dominate the forum) by virtue of the Supreme Court's decision in *Widmar v. Vincent*.⁴⁰ Because the Supreme Court has not considered a similar case arising in lower education, passage of equal access legislation would resolve a growing conflict in the lower federal courts over the applicability of *Widmar*-type reasoning at the high school level⁴¹ and would extend similar protection to elementary school students (when extracurricular forums existed at that level).

While equal access legislation (because of its more obvious free speech component and because of its lesser potential for coercion) can be distinguished from direct and indirect attempts to legislate school prayer, more coercive indirect attempts to re-institute school prayer can be seen in the several so-called court-stripping bills. These types of bills have historically been controversial and are considered by many to be of doubtful constitutionality.⁴² Passage of any one of these bills by Congress would thus be only the first step in a controversy with political ramifications far beyond the immediate substance of the proposal.

JUDICIAL RESPONSE TO STATE PRAYER INITIATIVES: 1983

In a complex series of complaints and amended complaints, received and decided by the federal courts in 1982-83, Ishmael Jaffree, on

37. Freund, *Storms Over the Supreme Court*, 69 A.B.A. J. 1474, 1480 (1983).

38. S. 1059, 98th Cong., 1st Sess. (1983).

39. H.R. 2732, 98th Cong., 1st Sess. (1983).

40. 102 S. Ct. 269 (1981).

41. See, e.g., *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), cert. denied 102 S. Ct. 800 (1983); *Bender v. Williamsport Area School Dist.*, 563 F. Supp. 697 (M.D. Pa. 1983). The *Bender* case has been appealed. *School Law News*, June 17, 1983, at 8.

42. See, e.g., Comment, *supra* note 29 and Freund, *supra* note 37.

behalf of three of his children, sought to limit school prayer activities in Mobile County, Alabama. The issues sought to be resolved by Jaffree included the constitutionality of certain teacher practices in conducting school prayer throughout the 1981-82 school year and of two 1982 Alabama statutes, referred to collectively as the "Alabama Prayer Statutes." Jaffree's complaint was initially severed by the federal district court into two actions, one against local school officials concerning the allegedly offending teacher practices, and one against state education officials involving the Alabama Prayer Statutes.⁴³ A preliminary injunction was issued on August 9, 1982, enjoining the enforcement of the prayer statutes;⁴⁴ but when the companion cases were later dismissed for failure to state a claim upon which relief could be granted, the injunction was dissolved.⁴⁵

Dismissal of these cases, in January of 1983, was based upon the much criticized and later reversed conclusion that "the establishment clause of the first amendment to the United States Constitution does not bar the states from establishing a religion."⁴⁶ One month later, Justice Powell, in his capacity as Circuit Justice for the Eleventh Circuit, rejected the conclusion of the district court judge that "the United States Supreme Court has erred,"⁴⁷ saying that "unless and until this Court reconsiders the foregoing school prayer decisions, they appear to control in this case. In my view, the District Court was obligated to follow them."⁴⁸ It was against this background that the Eleventh Circuit Court of Appeals, in May of 1983, decided the once again consolidated cases concerning school prayer in the state of Alabama.

The issue on appeal in the case of *Jaffree v. Wallace*⁴⁹ was whether local religious practices and two state statutes violated the first amendment's establishment clause. The religious practices complained of included teacher-led oral recitations of the Lord's Prayer and recitations of three other prayers, all of which included invocations to "God" or "Lord." The two state statutes were permissive in nature and allowed

43. The district court decisions in these cases were handed down on January 14, 1983. *Jaffree v. Board of School Comm'rs*, 554 F. Supp. 1104 (S.D. Ala. 1983), *rev'd sub. nom.* *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983); *Jaffree v. James*, 554 F. Supp. 1130 (S.D. Ala. 1983), *rev'd sub. nom.* *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983).

44. *Jaffree v. James*, 544 F. Supp. 727 (S.D. Ala. 1982), *argued* 554 F. Supp. 1130 (S.D. Ala. 1983), *rev'd sub. nom.* *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983).

45. *Jaffree v. James*, 554 F. Supp. at 1132.

46. *Id.* (emphasis added). See also, *Jaffree v. Board of School Comm'rs*, 554 F. Supp. at 1128.

47. *Jaffree v. Board of School Comm'rs*, 103 S. Ct. 842, 843 (1983), *quoting id.*, 554 F. Supp. at 1128.

48. *Id.*

49. *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983).

for one minute of meditation or voluntary prayer and for a teacher-led state-composed "prayer to God." The prayer began: "Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world."⁵⁰

After a brief historical review, the court of appeals reaffirmed that the "*Supreme Court has considered and decided the historical implications surrounding the establishment clause.* The Supreme Court has concluded that its present interpretation of the first and fourteenth amendments as applying to both federal and state governments is consistent with the historical evidence."⁵¹ Applying the three-part purpose-effect-entanglement test of *Lemon v. Kurtzman*,⁵² The court held that teacher-led prayer activity, which is a "quintessential religious practice," cannot have a secular purpose and that its primary effect was to advance religion.⁵³ The court also concluded that the prayer statutes had a religious purpose and effect, and therefore remanded the case with an order to enjoin both the practices and the statutes in question.⁵⁴

In another 1983 federal court decision, *Duffy v. Las Cruces Public Schools*,⁵⁵ a statute allowing for "a period of silence" to be used for "contemplation, meditation or prayer" was declared violative of the United States Constitution and the Constitution of the State of New Mexico. In addition to the plain language of the statute, which evidenced a legislative purpose to provide for prayer in public schools, the court looked to the historical context in deciding that the addition of the words "contemplation" and "meditation" was "a transparent ruse meant to divert attention from the statute's true purpose."⁵⁶ It was the understanding of the General Counsel of the State Department of Education that he was drafting a bill for legislative consideration that "would authorize some form of prayer in our public schools."⁵⁷ The court also determined that the legislative purpose coupled with the public's attendant perception of the statute as authorizing religious exercises would have the effect of advancing religion.⁵⁸

The third part of the establishment clause test was also violated because there was evidence of entanglement in the form of political

50. *Id.* at 1528-29.

51. *Id.* at 1533.

52. 403 U.S. 602, 612-13 (1971).

53. *Jaffree v. Wallace*, 705 F.2d at 1534-35.

54. *Id.* at 1535-37.

55. *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013 (D.N.M. 1983).

56. *Id.* at 1019.

57. *Id.* at 1015.

58. *Id.* at 1016-17.

divisiveness. Board members were influenced to favor the implementation of the statute because they perceived that their actions would impact favorably on a bond issue, four teachers had refused to implement the minute of silence, 27 percent of the students were against it, and more teachers disapproved of the provision than favored it.⁵⁹ In addition to declaring the statute unconstitutional, the court enjoined any future implementation of its provisions: "This will guarantee that the defendants will not again be pressured into adopting such a program, and insures the integrity of the holding of the court."⁶⁰

Another state which experienced controversy over a moment of silence in 1983 was New Jersey. The case of *May v. Cooperman*⁶¹ involved a challenge to that state's statute requiring that public schools permit a moment of silence for "quiet and private contemplation or introspection."⁶² The statute, which was approved by the New Jersey legislature over a veto by Governor Thomas H. Kean, was thought by its supporters to be constitutional because the moment of silence was to be used at the discretion of individual students and because prayer was not mentioned or encouraged in any way.⁶³ The law was opposed by a number of individuals and groups including the American Baptist Churches of New Jersey, the State Council of Churches, the New Jersey School Boards Association, the New Jersey Education Association, and the A.C.L.U.⁶⁴ During oral arguments in the case, a professor of theology said that "silence is very much a part of the paraphernalia of religion;" and according to a professor of education, the law is "bad education, and it's bad religion."⁶⁵

A decision in the *May* case was issued by federal district court judge Dickinson R. Deboise on October 24th, declaring that the law had a "religious purpose," which would "tend to promote divisiveness among and between religious groups" (thereby violating both the purpose and entanglement tests), and an effect which "both advances and inhibits religion."⁶⁶ The decision illustrates the increasing tendency of federal courts to look beyond the explicit meaning of statutory language to the historical and contemporary context that produced the statute and to its connotations.

Other cases concerning school prayer, which were unreported or yet to be reported in October of 1983, include *Crockett v. Sorenson*⁶⁷

59. *Id.* at 1017.

60. *Id.* at 1023.

61. *May v. Cooperman*, No. 83-89, — F. Supp. — (D.N.J. 1983).

62. N.Y. Times, Sept. 18, 1983, at 6E, col. 1.

63. *Id.*, see also, Education Week, Sept. 21, 1983, at 5, col. 4.

64. Education Daily, Sept. 28, 1983, at 5, col. 1.

65. *Id.*

66. N.Y. Times, Oct. 25, 1983, at B2, col. 5. See also *id.* at 1, col. 2.

67. *Crockett v. Sorenson*, — F. Supp. — (W.D. Va. 1983).

where a federal district court in Virginia held that a fourth and fifth grade Bible class program which included prayers and hymns, violated the establishment clause of the Constitution. The major problem with the program, according to the judge, was that it was conducted by outside religious organizations on school property. The ruling stated that the classes could be reinstituted on a voluntary basis if the school controlled the course content, if regular certified teachers taught the classes, and if there was no attempt at religious indoctrination.⁶⁸

A Georgia federal district court and a California court of appeals also prohibited other religious practices in 1983. In June, a federal district court in Georgia issued a ruling prohibiting religious assemblies, the posting of religious notices on school bulletin boards, and the posting of church signs on school property. Also prohibited in *Nartowicz v. Clayton County School District* was the recognition of a junior high school Youth for Christ Club.⁶⁹ In June, just before graduation, a California state court enjoined graduation prayers at two high schools in Livermore, California. The injunction issued in *Bennett v. Livermore* was upheld by a state court of appeals, which said that the practice violated both the state and federal constitutions.⁷⁰

In addition to efforts by state legislators and state and local education officials to institute avowedly religious or quasi-religious practices in public schools, controversy continued in 1983 regarding the constitutionality of equal access for voluntary religious groups. The higher education case of *Widmar v. Vincent* (1981),⁷¹ where the Supreme Court mandated equal access to a university forum based upon freedom of speech principles, had already had an impact on cases arising in lower education.

In the case of *Bender v. Williamsport Area School District* (1983),⁷² a federal district court in Pennsylvania, closely following the reasoning of the *Widmar* case, held that a voluntary religious group must be permitted to meet in the semi-public forum of a regular high school activity period. In contrast, the Supreme Court in 1983 denied certiorari in the earlier case of *Lubbock Civil Liberties Union v. Lubbock Independent School District*,⁷³ where the Fifth Circuit had concluded that a school board policy permitting equal access for voluntary

68. Educ. Week, Aug. 17, 1983, at 9, col. 3.

69. *Nartowicz v. Clayton Cty. School Dist.*, No. C83-1A (___ D. Va. 1983).

70. *Bennett v. Livermore*, ___ (Cal. Ct. App. 1983). Reported in *School Law News*, June 17, 1983, at 7.

71. *Widmar v. Vincent*, 102 S. Ct. 269 (1981).

72. *Bender v. Williamsport Area School Dist.*, 563 F. Supp. 697 (M.D. Pa. 1983).

73. *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), cert. denied, 102 S. Ct. 800 (1983).

religious groups was unconstitutional, in part, because it was contained within a broader policy concerned with the place of religious activities in public schools. Even the *Lubbock* case elicited differing opinions, however, with the federal district court initially ruling in favor of the student group and four out of eleven circuit judges dissenting from a denial of rehearing.⁷⁴

The equal access question is likely to become even more prominent in 1984 than it was in 1983. The second session of the 98th Congress (1984) may bring passage of equal access legislation, and there will be additional judicial activity with the appeal of the *Bender* case.⁷⁵ The clearly distinguishable efforts to bring prayer back into the classroom, whether in audible or silent form, face mounting opposition at both the federal and state levels. An indication of this can be seen in the array of religious groups opposed to a moment of silence (surely the least controversial of such measures) in the state of New Jersey. There is little reason to believe that the conflagration ignited by the Supreme Court more than twenty years ago will die out soon or that efforts to define "benevolent neutrality" will cease. Although 1983 brought increased attention to the relatively new equal access issue, the complex problems suggested by the deceptively simple question "Shall we pray?" will remain in 1984.

74. *Id.*, 680 F.2d 424 (5th Cir. 1982), denying reh'g to Lubbock, 669 F.2d 1038.

75. School Law News, June 17, 1983, at 8.

How to Avoid an Educational Malpractice Suit

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WHY DO I NEED THIS INFORMATION?

Nearly every state requires its children to attend schools for eight to ten years. Many states provide either through the state constitution or through legislative enactment that the education provided be "adequate" or "effective," and recently all fifty states have considered some form of legislation to hold schools accountable for providing such an education. The Supreme Court has said that

[u]niversal compulsory education is such an integral part of American Society that its underlying assumptions are rarely questioned. . . . [I]t is perhaps the most important function of state and local governments.¹

While the courts have not said that there is any implicit right to an effective education,² it has "strongly implied that individuals have a fundamental right to basic minimal skills necessary for the enjoyment of the right of free speech and full participation in the political process."³ A recent federal district court decision has, for the first time, held that graduation from high school is both a property and a liberty right.⁴

1. See *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); *Project-Education and the Law: State Interests and Individual Rights*, MICH. L. REV. (June 1976).

2. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1972); *Project-Education and the Law: State Interests and Individual Rights*, MICH. L. REV. (June 1976).

3. *Id.*

4. *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979).

There is little doubt that effectively educating our youth is an integral part of American Society—involving enormous resources and costing billions of dollars each year.

In 1983-84 Florida alone will spend close to \$2.75 billion to provide an educational opportunity to its 1,600,000 public school students through its program of 32 services which includes alternative and basic programs. The 67 school districts will employ 151,530 teachers, administrators, supervisors, and other staff to help carry out this huge task.

Education can surely be considered a high priority item when it demands eight percent of the gross national product, requires tremendous legislative effort, and generates thousands of legal suits each year. Yet, with all the effort our nation expends to produce healthy, happy, functionally literate individuals sometimes something goes wrong: a law is passed that is unfair to a particular group of students; a school district fails to enforce its own rule; an incompetent teacher is employed; or, an otherwise competent teacher violates his professional obligations.

WHAT ELSE CAN GO WRONG?

A student could be hurt physically while playing on the school playground. If he was improperly supervised at the time of the accident, his teacher could be held accountable for her failure to protect him from harm. If the teacher happened to be a coach who acted overzealously, insisting that a student perform beyond his physical ability, a court of law would say that the teacher must be held financially liable for the harm suffered by his student.⁵ Negligence which results in physical harm to children under the protection of adults who should have foreseen the imminent danger has resulted in a substantial number of court cases. Often teachers are held financially responsible for the harm students suffer as a result of teacher negligence.⁶ Academic negligence, on the other hand, is a somewhat new phenomenon for educators. Such instances, where a student's harm is academic rather than physical, have resulted in suits charging school districts with what has become known as "educational malpractice."

5. See, e.g., *District School Bd. of Lake Cty. v. Talmadge*, 381 So. 2d 698 (Fla. 1980). A physical education teacher was held liable for his personal negligence that resulted in a student injury.

6. In *Raleigh v. Independent School Dist.*, 275 N.W.2d 572 (Minn. 1978), plaintiff recovered damages suffered when she was cut by another student while attending a movie with her high school class. The teacher was found negligent in failing to provide for the student's safety.

WHAT IS EDUCATIONAL MALPRACTICE?

Educational malpractice has not been defined by a court. For purposes here it is defined as

an intentional or negligent act or failure to act which constitutes a breach of duty to properly educate or place a student which results in an injury to that student.

Article IX, Section I of the Florida Constitution provides

[a]dequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of higher learning and other public education programs that the needs of the people may require.

Most states have a similar requirement that students be provided an adequate, effective, minimum educational program. If a school district were to arbitrarily deny an adequate free public education to a student and the student suffered harm as he most surely would if he were without an education, the school district may be said to be guilty of educational malpractice.

WHAT CONSTITUTES NEGLIGENCE?

Negligence represents one category of tort⁷ law which is best described as an action that fails below an acknowledged standard of care which results in injury to another person. The basic elements necessary to establish negligence are: 1) a duty to conform to a standard of conduct established to protect; 2) a failure to conform to that standard; 3) a harm suffered which is legally compensable; and 4) a causal relationship between the harm suffered and the failure to conform.⁸

A professional is generally held to a higher standard than that of an ordinary man. That standard is often established both by professional standards and by public policy.⁹ Under the law of torts, once a professional undertakes to perform a duty, the law of negligence requires him to do it with care. Malpractice adds one more dimension to the element of "care;" the aspect of a special relationship existent between the professional (doctor, lawyer, educator) and the client (patient, student). Courts have acknowledged that a special relationship exists between student and teacher and that teachers are required to behave as professionals.

7. Tort is defined as a "civil wrong."

8. THE YERBOOK OF SCHOOL LAW 1978 (P. Piele ed. NOLPE) at 238.

9. J. Blackburn, *Educational Malpractice*, 7 FORDHAM URBAN L. J. (1978-79).

WHAT DOES THIS MEAN TO ME?

To date, no court has recognized educational malpractice as a viable basis upon which to recover damages. Many experts feel that educational malpractice should be judicially recognized and that as statutes and regulatory mandates create greater accountability in public education and specify more clearly a standard of care, the courts may at last recognize such a cause of action. That will mean that students who suffer academic "injuries" because a school system failed to live up to its mandate may turn to the court for remedy.

With increased access to legal services, more Americans sue today than ever before. Publicity about such suits tends to breed even more. The medical profession has been severely distorted by suits and fear of more suits. One of every two doctors can be expected to be sued during his career. Some doctors pay more in insurance premiums than many teachers earn!¹⁰

The suit phenomenon has moved beyond the health care services and has affected attorneys, architects, engineers, and educators. Educational malpractice, almost unheard of before the *Peter W.* case in California in 1972,¹¹ is now at least a familiar expression if not a source of alarm, for most authorities in law and education. To date, three cases have reached state supreme court or court of appeal level and many other states such as Florida, Maryland, and New Jersey have experienced suits alleging educational malpractice.¹²

Many other cases such as those involving testing issues, diploma denial, and inappropriate placement have implications for educational malpractice type litigation.

Florida, for example, has had one educational malpractice case in one county, has one with implications for a malpractice suit pending in federal district court in another county and has recently completed a five-year-long suit related to its testing program in federal circuit court and is currently defending the test in another suit in federal district court.¹³

HOW CAN WE PREVENT MALPRACTICE?

It is generally wiser to solve problems rather than crises; to deal with those problems at the symptomatic stage rather than wait for the

10. M. Halberstam, *Hey, You Ought to Sue the Teacher*, AM. EDUC. (Nov. 1978) at 7-10.

11. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (Cal. Ct. App. 1976).

12. See *Garrett v. Broward Cty.*, No. 77-8703 (Fla. Cir. Ct. 1978); *Doe v. Board of Educ. of Montgomery Cty.*, 48 U.S.L.W. 2077 (Md. July 31, 1979).

13. See *Garrett v. Broward Cty.*, *supra* note 12; *Debra P. v. Turlington*, *supra* note 4, and *Love v. Turlington*, No. 80-550-Civ-FH (M.D. Fla., filed May 6, 1980).

disease to become an epidemic. The task of remedying malpractice should be to alleviate those educational practices that can be alleviated, and encourage those practices that should be encouraged. The job should not be reduced to preventing or fulfilling a predicted future.¹⁴ Whether or not suits will occur is really not the major issue. Identifying educational malpractices relevant to the educational malpractice situation, eliminating or encouraging them in an appropriate manner, and ultimately improving the quality of education is the issue. If this incidentally brings about a reduction in the number of suits, so much the better. The guidelines contained here are a reaction to a serious problem not a genuine crisis, and are an attempt to create a manageable noncrisis atmosphere where reason will generate wise judgments.

A recent report prepared by HEW estimated that five million patients are injured each year. Of that number, perhaps one million have sufficient base in negligence that a viable lawsuit could be forthcoming. Originally, patient ignorance could be counted on to keep the numbers of suits low. A 10-15 percent increase annually from the mid 1960's has shown the illogic of counting on that as a preventer of suits. Comparable figures in education have not been calculated but with the vast numbers of students in our public schools, the number of viable claims can be projected to be at least enough to consider educational malpractice a serious problem.

WHAT SHOULD SUCH GUIDELINES INCLUDE?

Educational guidelines can pattern themselves very easily after those established for other professionals.

- (1) Determine what are good practices for the educational profession;
- (2) Determine what actions are provoking suits or are, in general, bad educational practices;
- (3) Define what restrictions, such as state laws, impede improved practices; and,
- (4) Describe future considerations such as alternatives to going to court, insurance, etc. that are necessary to minimize the impact when suits do occur.

WHAT CAN WE EXPECT?

Lawsuits tend to be epidemic; the more the public reads about them, knows about them, the more the right to sue will be directed

14. R. GOTS, *THE TRUTH ABOUT MEDICAL MALPRACTICE* 198 (1975).

against the educator. If the medical analogy holds up, malpractice suits can be expected to affect education by stifling innovation, increasing paperwork, and creating adversaries from parents.¹⁵

If malpractice suits have the effect on educators that they have had on other professions, and there is much evidence that this may very well be so, the choices for educators become limited. They can sit by and wait for a more sophisticated plaintiff to appear and win his suit; or educators can accept the message of the courts thus far—renew faith in themselves as being the best authorities on education—and make some changes that will eliminate many of education's bad practices.

Negligence occurs in the academic arena just as surely as it does on the playground, on the highway or under the surgeon's knife. The harm negligence or educational malpractice causes may be less visible to the naked eye than an injured body but many would argue that an injured, uneducated mind is far more devastating to the individual and his self image than that of a broken bone or temporary psychological trauma. Tort law provides a remedy for most forms of harm done by negligence and malpractice, but, for policy reasons, educators have been immune from this liability. Educators themselves have been left with the responsibility, if not the legal mandate, to provide the remedy.

Malpractice in any field bears but a "tangential relationship" to genuine malpractice. Although actual malpractice occurs, suits tend to occur in areas where clients have high expectations, little tolerance, and access to lawyers. Courts may have adopted a hands off attitude toward educational malpractice suits for the present but as Belle Lind Gordon pointed out:

[F]inal responsibility for determining the validity of state educational standards and school board rules must lie with the courts if only for the reason that no other recourse exists.¹⁶

Let professional educators assert what they have known all along—that to educate implies a duty to educate with diligence, regard, and care.¹⁷

WHAT SHOULD WE DO FIRST?

Educators should take the initiative and define good educational practices. Next, they should analyze closely actual practices, with

15. M. Halberstam, *supra* note 10 at 7-10.

16. B. Gordon, *Doe v. San Francisco Unified School District*, 1973: *Tort Liability for Failure to Educate*, 6 LOY. U.L.J. 482 (1975).

17. L. Lessinger, *The Exercise of Due Care in Education: Towards Standards of Professional Practice*, EDUC. TECH. (April 1980) at 15-19.

special emphasis on those that tend to be suit-producing activities. It must be determined what, if any, impediments exist within the law or elsewhere that preclude changing these practices.

WHAT ARE GOOD PROFESSIONAL PRACTICES?

Generally, a good professional practice is one which is reasonable to both the practitioner (educator, in this case) and the client (parents and students), and can be easily implemented. The following suggestions are adaptations of general recommendations made by those in other professions for improvements in their respective fields. They offer advice that can be valuable as educators attempt to determine what is good educational practice.

Establish education as a professional practice

Educators may do well to look at the path that has been worn in this direction by other professional groups and take a second look at what educators have done in this area. Most professional groups have banded together to strengthen their profession by limiting access to the field, establishing standards of conduct and ethical behavior, and removing from practice those who perform their work negligently.

Leon Lessinger, the father of accountability in education, urges development of a professional practices attitude based upon legal and practical principles of due regard, due care, and due process. Due regard refers to an awareness on the part of educators that they are indeed practicing professionals. Due care refers to carrying out the educational process with a humane attitude that requires that educators take care to do what is best for every student. Due process provides that a mechanism be established to allow parents and students a forum for disagreement with educational policies and practices.

The development of professional standards and ethics, establishing internal monitoring devices such as professional practices councils, and influencing legislative decision making can be positive steps toward the evolution of education as a professional practice.

Utilize the information we have available to take a look at educators' problem areas

Factual data can be gathered easily by the professional practice council, from the office of the general counsel for the department of education, school board attorneys' associations, teachers' unions and other sources concerning unacceptable educational practices. Although, with the exception of the professional practices council, these are not investigatory agencies, analyses of complaints against

teachers, administrators, and school boards will reveal behaviors of teachers and other educators which provoke investigation. By their very nature of attracting unfavorable attention, these may be practices that should be targeted as ones to be abolished as quickly as possible.

Be reasonable

It is reasonable to expect that an unusual situation calling for special care and attention receive special care and attention. It is reasonable to admit a mistake if one has occurred and to assure parents that the school is making every effort to provide a remedy. It is unreasonable to delay advising parents of a problem in the hopes that they either will remain unaware or, upon discovery, will not take action. It is reasonable to acknowledge the problem and to suggest alternatives before proceeding. No attempt should be made to conceal, downplay, or minimize the problem. Where it is appropriate, parental consent should be given before electing an alternative course of action. Consent should be informed, voluntary, and unhurried, and no attempt should be made to embellish the remedy.¹⁸

Reasonable also applies to our expectation of teachers

It must first be determined if the expectations for teachers are realistic. Once the unrealistic elements are identified changes need to be made to accommodate the identified needs that are not being met. For example, is it realistic to ask a first grade teacher to attempt to teach reading to 30 youngsters where the range of reading ability is 0-4.5 and the curriculum is such that only one hour a day can be allotted for reading *per se*? If this is, in fact, a fantasy, and a teacher needs two hours, a more flexible curriculum, fewer students, and a narrower range of ability levels, then these identified needs must be met before she can reasonably be expected to operate realistically. Allowing the first situation to perpetuate itself may well result in a lower achievement rate, a higher failure rate, misdiagnosis of reading and language problems, and discipline problems which contribute to less than adequate education and may create liability. They, in other words, contribute to education's bad practices and may also provoke malpractice suits.

Teachers have argued for years that what they need to do their job better is to have fewer students. What they have received is practically everything but: higher salaries, more sick leave, additional health and life insurance, longer vacations, shorter vacations, more inservice, less inservice, paid college tuition, more stringent entry requirements, teacher competency tests, student competency tests—but very little

18. W. ALTON, JR., MALPRACTICE: A TRIAL LAWYER'S ADVICE FOR PHYSICIANS (HOW TO AVOID, HOW TO WIN) 100 (1977).

progress has been made toward reduction of class size. Teachers are graduated and cannot find jobs. Schools close because of a lack of students. Rarely, however, do public schools operate with an average class size in elementary grades of under 1 to 25: 1 to 20 is extremely rare, 1 to 27 is more usual. In secondary schools the ratio is seldom 1 to 30, but averages 1 to 35.

Involve postsecondary institutions, colleges of education as well as other colleges such as public administration, business, and law, in the policymaking of education and allow them some responsibility in carrying out educational policies

For example, colleges of education were vital to the development of Florida's teacher competency testing. The results of the testing will affect both the entry into colleges of education and entry into the profession itself. A similar program, were it to be developed for administrators in education, may require similar input from colleges of public administration, business, and law, and others since administration requires knowledge beyond that of education.

Involvement of colleges of education and others at the local school district level could do much to point out strengths and weaknesses and offer suggestions for improvement in education practices and management skills. Much of value may result from an interinstitutional approach to textbook adoption, purchase or production of curriculum materials, and preparing curriculum packages if departments of music, art, and science are utilized to a greater extent.

Increase availability of information concerning legal aspects of education

Educators have few opportunities to acquire information concerning the legal aspects of education. Students often have better access to information on law that affects them than teachers do.¹⁹ Additional college classes at both undergraduate and graduate level are needed to increase educator awareness of rights and responsibilities inherent in local, state, and federal law involving education.

Looseleaf services and school law materials are published in record amounts. Never before has so much material been available concerning legal aspects of education. Much is aimed at the practitioner and is easy-to-understand, practical, current information. Of special interest to school personnel are *Education Daily*, *Nolpe School Law Update*, *Nolpe Notes and Reporter*. Information from sources such as *US Law Week* should be disseminated through a mechanism such as a newsletter that

19. Although Florida law makes provision for law education in grades K-12 as well as inservice education for teachers, administrators, and others, little training has been provided for teachers. See FLA. STAT. § 233.0615.

would reach school boards, superintendents, central office personnel, administrators, and teachers. Specialized information such as pertains to vocational-technical teachers, teachers of handicapped students, physical educators, guidance counselors, and others could be coordinated through the district supervisor responsible for each area.

Be involved in the legislative process

Each educator should be aware of current and pending legislation which affects him directly and affects those things he does. Lawmakers and their staffs depend heavily on input from lobbyist groups and their constituency to bring areas of concern to their attention. If an educator or any citizen, for that matter, becomes aware that a law is potentially harmful due to an unanticipated impact, that educator has a responsibility to bring that fact to the attention of someone who can influence that piece of legislation. It may simply involve a phone call or a short note to a legislator, or a member of his staff, or the lobbyist for the district or group affected. The same may be true for initiating legislation.

Demonstrate a willingness and ability to initiate suit or countersue to discourage suits

A willingness to countersue discourages suit, especially those that are filed maliciously by disgruntled complainants, and for which there is little chance of success in recovery.

The best defense for a school district charged with educational malpractice is to engage regularly in good educational practices. Of course, this has the added benefits of causing fewer suits to be brought in the first place, and having even fewer succeed. Knowing his is a strong defensive position tends to give a defendant the added advantage of knowing that he may be successful as a plaintiff in a countersuit.

Suits will occur and the potential increases with nearly every additional service a school system offers. That should not discourage new programs. No matter how good a professional is or how well intentioned he performs his tasks, malpractice suits may occur that are malicious or not so well intended. When they do, there are alternatives to sitting still and taking it. School districts can learn what other professions eventually learned the hard way, that by demonstrating a willingness to countersue, they discouraged many suits.

BUT, WHAT ABOUT OUR ACTUAL PRACTICES?

As courts have acknowledged, and as every practitioner knows, there is no agreement about what constitutes a "best" way to educate.

There is much documentation to indicate, however, that some ways are better than others, and there is little doubt certain practices are undesirable, and should be discouraged.

The following are suggestions for changes of certain actions that may improve current practices.

Set minimum standards for student competency

School districts should take the initiative in establishing, setting, and measuring standards of minimum student competency. In Florida, the legislature, in Section 229.57, Florida Statutes, in its wisdom mandated that this task be assigned to the commissioner of education. The student assessment section of the division of public schools oversees most aspects of the testing program. An effective working relationship exists between the legislature and the department of education in the development and administration of the testing program within the public schools. There has been a willingness on the part of the legislature to amend the statutes concerning educational accountability making appropriate changes to accommodate changing educational needs.

An effort has been made to keep the channels of communication between the various governmental agencies open in regard to the assessment programs. Universities have been involved from the outset; attorneys are consulted concerning compliance of Florida's program with recent court decisions on testing and placement; and, much is done to adjust the program to the special needs of students such as those who are blind, handicapped, or foreign speaking.

It is vital that an appropriate standard of care in education and placement of students be evident. The school district must formulate policies consistent with reasonable standards of care and develop procedural safeguards to permit careful scrutiny to insure adherence to safeguards that are developed.

The assessment and evaluation of students may or may not involve a formal testing program. Other methods of evaluation may be an informal testing program. Other methods of evaluation may be explored and found preferable. The trend for traditional testing methods seems to be here to stay for awhile as evidenced by all 50 states' consideration of this as a viable method of determining achievement of its students. However, this should not be the only criteria for promotion, placement, or graduation nor should the search for an effective, efficient, equitable method of evaluation stop with minimum competency testing as it now exists.²⁰ Coleman and Burkhead found in their studies that

20. T. Flygare, *Causes for Increases in Education Law Cases*, Speech delivered February 28, 1979 at Phi Delta Kappa, Florida A & M University Chapter, Tallahassee.

achievement is highly correlated with family income, educational background, and aspirations of other students in school.²¹ This may be an important consideration in determining how much weight test scores have on placement decisions.

Influence colleges of education to require teachers to learn to diagnose and prescribe in all areas of teaching

Diagnosis of educational problems and prescriptions for "cures" requires special training that educators cannot afford to have to learn on the job. Learning to read is a process that, for many children, is not completed in the elementary school. Every K-12 teacher needs to understand how children learn to read and how to improve those skills in any area where reading occurs—and there are not many areas where this does not occur the greater part of the instructional period. This is not to suggest that every high school physical education teacher needs to be able to teach a complete reading lesson; but it is to suggest that a high school math teacher may need to be aware of the varied reading levels of her students and provide for their differences in reading abilities.

Establish specific objective goals and remediation procedures for each grade

The court in its decision concerning Florida's testing program praised the procedure of establishing specific objective goals and testing to determine mastery of those goals. Remediation in *Debra P. v. Turlington* was recognized as an important part of this diagnostic and prescriptive process. This works best when test scores are used to determine placement in such classes and where movement into and out of the program is fluid; i.e., after a student has been remediated, he may move back into a regular classroom.

Teachers should be required to work not only on these minimum goals but should also establish similar goals for other areas of the curriculum for which they are responsible. This does not mean reducing the curriculum in its lowest common denominator. It does mean establishing a recognizable framework within which each teacher will work.

Use established minimum competencies and basic skills as partial criteria for progression through the grades (promotion) and graduation

This should not be the only criteria but it should be a major consideration when decisions concerning pupil progression and graduation are concerned. Objective test results provide excellent documentation

21. R. Funk, *Don't Bet on the Test Score Bandwagon*, KAN. SCH. BD. ASS'N J. (Spring 1980) at 8.

to indicate strengths, weaknesses, and compensatory measures taken to remediate students. If a student graduates, then claims he has suffered academic harm that has left him functionally illiterate, the school district can present a strong defense if it can show that minimum standards for functional literacy were set and the student reached those standards.

At the same time, a student who has not passed such tests, but has been promoted and/or graduated, has all the evidence he needs to show that the district failed to educate him to a minimal standard, was aware of it (through test scores), but misrepresented his progress (by promoting him). While minimum competency and basic skills tests can produce a classic catch²² situation for educators, it may be an acceptable risk that must be taken to insure fairness to students and to protect them from a meaningless, inadequate education.

Require teachers to have some evaluation mechanism

These may range from teacher observation to teacher-made tests, reading company tests, and so on. The important thing is to make certain that teachers are setting standards based upon what their experience and training tell them are appropriate. This should be a formal process rather than a hit-or-miss method. If a kindergarten teacher believes her observation of student interaction at snack time reveals important information concerning social maturity, and she wishes to use this in evaluating a child, she can develop some way of recording her observations through use of a checklist or by keeping anecdotal records. She should not take the process casually and then report that information back to parents with no back up. Too much harm has been done to children whose parents "took the teacher's word" for comments a teacher cannot recall saying or cannot remember on what she based her remark.

Establish individualized education plans

Individualizing education, teaching each child at his level at his own pace, tailoring materials and programs to meet student needs is the optimum teaching method of the present and the near future. To ask teachers to prepare individualized education plans (IEPs) to supplement traditional monthly, weekly, and daily planning should be a minimum requirement. However, this tends to be an enormous task, particularly with the large class load most carry. At the same time, many teachers find that individual plans are necessary in order to keep track of what is being taught, to whom, when, and by whom (extra personnel is often required).

22. M. McClung, *Hoffman Case: Educational Malpractice*, FOOTNOTES (Feb. 1980).

Provisions of PL 94-142 (Education for All Handicapped Children Act) are excellent recommendations for what should be a part of the minimum planning of a student's educational program.

Provide teachers with a mentor

Many bad professional practices are the result of a negligent rather than an intentional action. However, the patient is just as dead and the student is just as ignorant regardless of whether the surgeon or the teacher intended the harm. Just as a surgical team, led by a top surgeon, must provide on-the-job training for the young physician once he leaves his books, so also a team-mentor approach may be valuable to the young teacher.

Resolve "social promotion" policies

With all states at least considering and 38 adopting minimum standards and testing to measure achievement of those standards, social promotion seems in direct opposition. Using standards as criteria for grade progression and for graduation are the next logical steps. Sixteen states have adopted the passing test score as a requirement for promotion and/or graduation. Since there are other factors that come to play in student ability that may be measured by a test, there should be some flexibility once the testing process is deemed successful.

Improve methods of reporting pupil progress

Most parents and students understand grades like A, B, C, or 1, 2, 3, 4, or 70, 75, 80—are comfortable with the method and reluctant to have report card time roll around without such direct feedback.

However, there are other, perhaps more subjective, accurate and effective methods that can supplement the graded report card. Conferences and written narrative comments are two such alternatives to the usual graded report card.

Be aware of foreseeable risks that accrue when students are inappropriately placed or promoted

A review of recent court decisions in this area of the law will make the legal issues clear. However, a humane attitude toward individual students, their goals and their aims will yield a clearer picture of what they and their parents expect to happen as a result of their schooling. Anything that impedes attainment of the highest achievement level possible for each individual or fails to encourage fullest participation in educational opportunities provided is suspect.

Establish procedural safeguards concerning student placement

Due process procedures similar to those required by PL 94-142 should be provided for all students and their parents, including notification of the placement decision whenever placement is other than that involved in normal pupil progression. An opportunity should be provided for parents and older students to examine appropriate records. Opportunity for an impartial hearing with the student represented by counsel in which parents may participate should be established. The procedure would also require a process of review and appeal as well. A similar, though less formal, structure, might be considered for challenges to normal pupil progression plans, particularly where testing scores are a major factor in determining which students pass and which fail. The actual procedures required by PL 94-142 are cumbersome and time consuming and therefore adaptations of this procedure are preferable to wholesale adoption of PL 94-142 safeguard system.

Require that written approval be obtained from parent or guardian for any act or agreement which may affect his child's rights, privileges, status, placement

This may not be a legal requirement but it is an important procedure to follow, especially in areas that may have the potential for misunderstandings. Educators and parents should function as partners in the child's educational process—and partners often put agreements in writing. A paper signed by a teacher, a principal, a counselor, and a parent concerning temporary placement in a classroom may or may not constitute a legal contract; however, it is an indication that a parent has had an official role in the decision. The school will be more likely to keep in mind the word "temporary" when such is the language in a written agreement.

A form can be prepared that will provide certain basic information concerning the change, when the change is to occur and when the decision will be reconsidered. Signatures of all those involved in the agreement are essential. It may be wise to have the school board attorney review the form, keeping in mind its purpose and potential for creating liability as well as avoiding it.

Require written confirmation of certain advice given a parent

Common sense and basic courtesy require that after a conference involving important decisions, a follow-up of some kind be made. Many educators make this a regular part of their routines; others do it on a sometimes basis; and still others have never considered it. A simple form can be designed that will not only provide quick, easy follow-up to insure that both sides understand what took place, but will also add an air of professionalism to the endeavor.

Keep good, accurate written records

Routine matters such as phone calls, letters, home visits, conferences, report cards, lesson plans, and test scores—to name a few—are ones which need to be recorded as reference for protecting the educational interests of students. They may provide a good defense by providing documentation that a sound educational program is operating.

Issue various kinds of diplomas

By leaving one standard diploma, schools provide all students with identical exit tickets, that may not have equal worth in the marketplace. Acknowledgment that students have varied skills, abilities and interests should be recognized and honored through the awarding.

Various kinds of diplomas could be issued to indicate the varying requirements taken to receive it (academic, vocational, business), the manner in which it was earned (results of a test score, attendance, earned credits), or the place where it was earned (vocational institution, accelerated program at a junior college, life skills program in the community). Care must be taken to insure that stigma is not attached to certain types of diplomas that make them less desirable and hence, at least on the surface, less valuable, or result in what amounts to a "tracking system." Provisions should also include conditions for "early-outs" by advanced students or those whose programs could be completed in fewer than the usual 12 or 13 years.

Develop (or redevelop) appropriate written documents such as handbooks and policies for governing bodies

Practical information needed by administrators, teachers, parents, and students should be readily available to define pertinent policies and establish lines of communication. Report card grading systems, dates of reporting periods, testing schedules, and a general calendar of events are of interest to all groups. A code of behavior and penalties for violations are not only helpful but may be legally required to show evidence that students and parents are aware of school rules and regulations.

Develop office manual to detail step by step procedure for all services regularly handled

The kinds of information on a single student housed in a school office is perhaps the most comprehensive collection of data that will ever be gathered on that individual throughout his lifetime. Yet, the place where all this vital, personal data is gathered and maintained often gives the appearance of being something less than might be desired.

School offices often are small, overcrowded, understaffed places filled with kids' artwork, attendance sheets, new textbooks, old textbooks, lost and found items, and kids in need—of bandaids, chalk, the phone—or waiting to be paddled.

Improve evaluation of teachers

The traditional methods of teacher evaluation with the principal visiting classrooms periodically might not be providing the diagnostic information that it should. Generally evaluations are quick affairs where a principal walks through various classrooms in his school a few times year or where he announces that he will visit for a specified number of minutes—typically 20-30 minutes. Teachers then prepare what amounts to a demonstration lesson that may or may not reveal their strengths and weaknesses. A better diagnostic and prescriptive method should be adopted.

Current methods seem to be unsatisfactory to all concerned providing little data and even less opportunity for teachers to improve their skills based upon constructive criticism. Many principals are actually not the best evaluators of what occurs in most classrooms. They have little experience in any area other than where they themselves taught and have never learned much about how to evaluate and offer meaningful suggestions for improvement.

A team approach whereby teachers evaluate each other under the guidance of principals and curriculum supervisors may be a more effective approach. Peer evaluation will help both those evaluated as well as those doing the evaluating.

Provide remediation for teachers

To deprive a teacher of a job is a serious step that must, nonetheless, be taken where it can be shown that he is ineffective, or negligent, for example. Where there is doubt concerning effectiveness, it may become necessary, and certainly is prudent, for districts to provide certain safeguards, such as a documentation, to substantiate the claim and due process procedure as recourse. An important step that is generally omitted is remediation. Through evaluation procedures, administrators should be able to recognize and identify a teacher's deficiencies and give a list of the complaints at the same time. The district may need to provide the opportunity for remediation to show its willingness to be reasonable in its expectations of its teachers.

Match areas of instruction with a teacher's certification

With the supply of teachers exceeding the demand, there seems little excuse for permitting a teacher to work outside her area of

certification. Colleges of education can provide for broader certification, encourage teachers to go into fields where greater needs exist, or both the districts and the colleges can look at other fields, such as health care services, to recruit personnel who can be cross-trained to meet educational needs of students who are now in classrooms that once would have been in institutions. To defer some of the cost for such programs, cooperative programs between districts and state may be considered.

Use classroom aides, tutors, volunteers, and interns wisely

When a patient retains a doctor for surgery, he expects that doctor to operate. When a student is assigned to a teacher it is expected that the bulk of that student's instruction will be provided by that teacher. It is possible, however, for a particular student to be assigned to work with aides, volunteers, tutors, and/or interns to such an extent that he spends little instructional time with the assigned teacher. This arrangement can create many unnecessary problems for the student and the teacher. Circumstances such as this can be detrimental and inequitable for students and fraught with legal problems. Where it is educationally appropriate to have someone other than the classroom teacher assist in providing instruction, it may be advisable to inform the parent of the arrangement and get written permission or at least acknowledgment. The ultimate responsibility for what happens in the classroom is that of the regular classroom teacher. Delegation of authority or responsibility for a child's learning, like his safety, carries with it the risk that a careless action on the part of a surrogate may accrue to the teacher as a charge of negligence. This is especially risky when the surrogate is not trained to handle the task assigned. Additional assistance from other adults in a classroom can do much to enhance the educational program; however, efforts must be made to insure that where this practice is used, it is not abused. Increased awareness and specific guidelines on the part of the school district are needed to insure that students are benefited by the program.

Employ public relations person with strong educational background at every level possible

Education is most definitely "big business." To borrow some of the more successful techniques from other professions may be good business.

Some states have been successful in this activity at the district level where the public relations person had ready access to community sentiment on a daily basis. Emphasis should be placed on effective use of the

media and improved personal contact within the educational community as well as the community at large.

Providing easy access to the superintendent for teachers can have a similar benefit. Some superintendents make a practice of scheduling meetings on a regular basis at various schools and inviting the staff there or from other schools to schedule brief visits for nearly any purpose they consider appropriate.

Regular newsletter and newspaper articles to promote educators and educational activities should be a regular occurrence rather than an exception. Even lawyers and those in the health professions realize that it pays to advertise. Educators may wish to advertise their superior product through some of these practices.

Observe your own rules

If a rule states that all students who score below 70 percentile on a specific test will be placed in a special program, put them there. If the rule states they will be retested or reevaluated in two years to determine placement, then retest or reevaluate in two years.

Changes in state and federal law, rules and regulations often mean revamping local rules. Not only do the changes need to be made to comply with state or federal laws, but they need also to be communicated to those they affect at other levels. For example, PL 94-142 brought about changes throughout the nation's school systems that affected state, local, and even building level rules and policies. The facts may not have been adequately communicated to those that need the information. The result has been confusion, errors in judgment, unintentional negligence, and ultimately school districts being sued.

Too often school districts invest time and money in developing rules or guidelines and then fail to enforce these rules or even determine that they have been adequately disseminated or understood by those who must operate under them on a regular basis.

Be aware that financing patterns have the potential for creating liability—exhibit conscious spending decisions

Equality in funding formulas can be, perhaps, one of the most discriminatory practices in a democratic educational system. Students enter school unequally, have unequal abilities and needs, and will exit schools unequally. To attempt to provide equal dollars for their education has negative consequences: those who require more, receive less.

Cases involving finance issues have tended to focus on constitutional guarantees such as "thorough and efficient education" and "adequate educational opportunities." There has been little emphasis on financing as an area of tort liability. However, decisions such as greater

funding for gifted than EMR students or requiring passing scores on minimum competency tests for promotion or graduation present areas of concern that could result in suits sounding in tort.

School boards must make every effort to insure that when students receive different funding allocations based upon different achievement levels, it is clearly understood why that is occurring. It is important that it be understood what measure of achievement was used, how it was used, and why it was used.

Employ legal counsel

Ideally legal counsel should be a full-time member of the central office staff. Where this is not financially feasible, an attorney should be employed on a retainer basis. The attorney's function should be as an authority on general law. He should not be expected to be equally conversant with all aspects of law that affect school board operations. Besides the legal aspects of education, school boards need advice and guidance concerning local zoning ordinances, building codes, product safety, tax laws—to mention a few. A legal counsel can function most effectively as an overseer, with the authority to consult with or even engage attorneys as they are needed for advice on specialized problems.

Court cases in education are fraught with examples of legally but, under the circumstances of the particular student, unreasonable behaviors on the part of those who perhaps should have known better. Educators know the implications of an action in the classroom and lawyers know the implications of that same action in a courtroom. Decisions made in education on legal issues should logically be based upon sound educational principles with all legal implications considered.

AREN'T THERE LEGAL RESTRICTIONS THAT INTERFERE WITH GOOD EDUCATIONAL PRACTICES?

Yes. Some such as those handed down by courts are ones that must be lived with. Others, such as state laws, require compliance but can be changed through the legislative process.

Redefine teacher tenure

Teacher tenure is actually a due process procedure intended as a safeguard against arbitrary or capricious dismissal. It has evolved over the years into somewhat of a guarantee of job security—not as a matter of law but as matter of practice. School boards have the authority to dismiss teachers who are incompetent but often fail to exercise their

authority—either because they have not been informed by their administrators, or perhaps do not wish to become involved in the unpleasantness.²³ For whatever reason, neither school boards nor school administrators are willing to take preliminary steps of documenting behavior or making substantial changes in evaluation procedures which would support allegations of incompetence against a teacher.

It has become rare for a teacher to be dismissed except for gross misconduct, blatant insubordination, or criminal actions, even though it has been estimated that some teachers are illiterate, or incompetent, and that many tend to be largely ineffective or inadequate.²⁴ These are harsh statistics and emphasize a need to utilize the due process procedure inherent in tenure. Protecting incompetency does little to upgrade or improve a profession. To the contrary, it erodes professional attitude and encourages many to retire on the job.

Return governmental immunity to state employees in specified areas such as academic negligence

The ultimate remedy to stop suit is to reinstate sovereign immunity. Under this doctrine, based on "the King can do no wrong" theory, governments and their agents could not be sued. However, a Florida Supreme Court decision in *Lake County v. Talmadge* had the effect of making government employees (such as teachers) personally liable for their own acts of negligence. Prior to this decision, state law provided "waiver" of sovereign immunity for government and its employees and made the employer liable to negligent acts of his employees.

ARE THERE ANY OTHER CONSIDERATIONS THAT WILL
EASE THE PAIN OF GOING TO COURT WHEN EDUCATIONAL
MALPRACTICE OCCURS?

Yes. There is provision within some state laws concerning professional practices of educators, physicians, and others that have potential alternative mechanisms in place, easily adaptable to the education situation. Attention must also be given to the question of insurance of what educators see as the role of the insurance company in malpractice.

Support malpractice insurance written by a national company operating under federal guidelines and offered on flat rate basis

It is uncertain whether or not traditional liability insurance policies (such as that issued by Horace Mann Insurance Company) will cover

23. Testimony before the Florida Senate Committee on Education concerning Professional Practices Services proposals attested to this situation.

24. P. COPPERMAN, *THE LITERACY HOAX: THE DECLINE OF READING, WRITING AND LEARNING IN THE PUBLIC SCHOOLS AND WHAT WE CAN DO ABOUT IT* (1978).

educational malpractice as it does other negligent acts. Patricia Hollander wrote in 1979 that at the time, her research indicated that not one insurance company wrote a policy covering educational malpractice.

The medical experience with malpractice insurance creates problems for the profession that can and should be avoided by educators. In 1974, thirty companies wrote malpractice insurance; by 1977 there were double that number. This meant that the insured's were "fractionalized" between more than 60 companies. Rates soared. Instead of getting rid of companies unable to provide adequate coverage at reasonable cost, state governments passed panic legislation.

A national company operating under federal guidelines could design a malpractice insurance system for all professional groups to work in the best interests of professionals and the public. A flat rate premium, as malpractice insurance had been in the 1950's, would be less discriminatory, would spread the cost over a larger group (rather than having a high risk group pay much higher premiums). It would contain "deterrent provisions" and provide much needed statistical data on the malpractice problem.

Currently, it is difficult to get accurate malpractice information concerning any one profession and virtually impossible to compile such data on all incidences of malpractice. Because incident reports would be available universally, that data would give a clearer picture of the malpractice problem. From this, a basis for establishing a sophisticated risk-management system could be developed to improve practices that fall below standards for that profession.

Develop mechanism for handling educational malpractice charges before they end up in court

A procedure such as is provided by PL 94-142 may be instituted at the district level to handle problems before they reach the suit stage. A structure for recourse concerning proposed placement and treatment of a student, for example, should be the first step. The parent would then have an opportunity for independent evaluation of the student, and finally, access to impartial due process hearings.

Institute nonbinding arbitration for resolution of malpractice disputes

Arbitration has become a popular method of settling disputes at the pre-trial stage. Medical malpractice panels, endorsed by both the American Medical Association and American Hospital Association,

typically consist of a panel of three lawyers who listen to a dispute, weigh the relative merits, and then render a ruling that may include a settlement to be paid to the plaintiff. If both sides agree to the ruling, the case is settled; but if either side disagrees, the case goes on the court docket.

The experience with medical panels has been that even though the decisions are nonbinding, their recommendations are frequently accepted or become the basis for a later pre-trial settlement. One of the advantages of nonbinding arbitration panels is that their quick resolution of cases (6 months to a year as compared to several years) saves money and avoids further harm to the plaintiff.

The advice offered for educators is that panels be mandatory, not optional, and comprised of attorneys, not educators. Educators are more effective serving as expert witnesses rather than as members of the panel.

SUMMARY

Increased demands to hold both government, professionals, and others accountable, has been expressed by the American public in a growing tendency to seek redress through the courts. This trend coupled with the analogous experience in the medical profession has produced a phenomenon in both education and the law—the educational malpractice suit. Parents, dissatisfied with the results of schooling, have begun to sue schools alleging students have failed to learn because schools have been negligent in their professional duty to educate. The response to this problem has come mainly, thus far, from legislators establishing minimum educational standards. The judicial response has been to recognize the harm but to leave the solution to educators. The guidelines developed by this study represent an educational answer to the problem: identify good professional practices, improve present practices, and eliminate practices which have the potential for liability for educational malpractice.

Ideally, if these guidelines are successful, neither educational malpractice nor suits making that allegation will exist. Even if such suits are brought, the guidelines provide for mechanisms to either dismiss the charges or provide remedy without the need for adjudication within the court system. For the guidelines herewith to function as an effective paradigm, they will require successful implementation in the districts with additional changes to reflect that they are reflections of current law. It will be necessary to evaluate and reevaluate them as practices change and as new responsibilities are assumed.

If the guidelines are unsuccessful, that is, if bad practices continue, students are harmed, and/or suits increase, the guidelines will require additional evaluation and alteration. It will require recognition of why they are unsuccessful and what changes can increase their effectiveness.

An additional cases accumulate concerning malpractice, immunity, testing, placement and other issues related to educational malpractice, it will be essential that the guidelines reflect those decisions. This is also true of changes in state and federal laws and regulations. It may well be that courts will come closer to a legal definition of educational malpractice than has been possible previously. This in itself may call for a revision in the focus of such preventive guidelines as are presented here.

As individual states become involved in either the educational malpractice experience or in evaluating educational output in the form of student competency, evidence is that they soon begin evaluating input in the form of teacher competency. Part of their evaluation of professional practices may involve development of guidelines such as those adopted by Florida school districts as a vehicle for improving professional practices or educators. The laws of each state are unique to that state. Therefore, while the Florida guidelines can serve as a model for other states, to be practical and effective, research must be done similar to what was done here to insure that they are consistent with laws and practices of that state.

Continuous research into the causes of and solutions to the malpractice problem in education carries with it the responsibility to go beyond what other professionals have contributed: gather data concerning professional educational practices that contain the potential for liability in a central (state) place in order to provide a clear picture of the problem; and continually evaluate preventative guidelines, their implication and effectiveness. Educators can start now to investigate their own professional practices in a sincere effort to prevent malpractice and provide a more effective education to students. They can become involved in the legislative process striving to prevent legislation that may create liability for districts but encourage laws which provide educational answers to educational problems.

Society as a whole accepts the professional's pledge of self-regulation through peer control, and grants in return privileges and advantages . . . when charged with negligence, as professionals they enjoy a unique position in the law in that conduct . . . is judged by professional . . . standards.²⁵

25. W. ALTON, *supra* note 18, at 100.

This quotation was found in attorney's advice concerning self-regulation of physicians, but with some effort on the part of educators, dedicated to the professional practice of education, it could easily refer to them as well. Educators can begin by placing emphasis on improving educational practices through identification of poor practices and taking steps to eliminate or change those practices. In this way, educators will be heeding the advice of the courts to initiate action rather than wait for judicial intervention.

Every educator assumes a responsibility to students the moment he walks in a classroom or leans over to help a student: to educate non-negligently, taking care to do his part to assure every student an adequate educational opportunity and to protect him from academic negligence—especially his own.

Empirical Research on Education Law Issues: A Model

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Riding forth on horseback to round up and brand all the empirical studies attempted during the past year on school law issues would be a mission impossible even with the help of a computerized man-machine system and a crew of fellow researchers. The herd is just too large and scattered and the strays too numerous for that to be accomplished. Lacking modern tools and accomplices, this researcher must beg the indulgence of his readers, and claim no more than a horseback appraisal of those studies as they appeared from the sources examined. An observation made by the eminent American jurist, Learned Hand, in a speech he gave in his eighty-fourth year near the end of a brilliant career.¹ Judge Hand said that even though the odds are against him, man can still win when he loses, if he has done all that he can under the circumstances.

And if at the end some friendly critic shall pass by and say: "My friend, how good a job do you really think you have made of it all?" we can answer: "I know as well as you that it is not of the highest quality; but I did put into it whatever I had, and that was the game I started out to play."

* The author wishes to express his deep appreciation to Dr. Perry A. Zirkel of Lehigh University, who graciously read the first draft and offered invaluable advice and counsel in the preparation of this chapter.

1. From *A Fanfare for Prometheus*, delivered before the American Jewish Committee, January 29, 1955 at the Hotel Roosevelt, New York City. In *THE SPIRIT OF LIBERTY* 297 (I. Dillard ed. 1974).

Everything is being revealed to you on the belief that good research is able to be replicated where the researcher leaves wide tracks that can be followed even though the trail be cold. Just what is the difference between *empirical* and other types of research?² Perhaps the best place to start would be with a working definition of *empirical*. So-called "empiricists" not only differ with others but they have a stubborn tendency to differ among themselves. The word *empiricism* signifies heavy reliance on experience. An empiricist³ is one who trusts in experience and is skeptical of pure research, or methods which, while they may seem theoretically sound, have not been proved in practice.

Empirical research, therefore, is by definition that method of inquiry which holds that observation and experience are the primary means of obtaining knowledge. It is to education and the law what pure research is to science. The basic form of reasoning used by empiricists is *induction*, which draws general conclusions from specific observations. By looking at a particular problem, the researcher hopes to induce a general principle from the observable data. Inasmuch as attempts to quantify phenomena in educational law are extremely difficult, and because honorable researchers often differ on what certain data mean, empirical research leaves much to be desired. The range is broad, all the way from biased pronouncements of the grossly misinformed all the way to highly dependable statements originating with those who have gone to considerable lengths to test their expectations in the field.⁴ What emerges is a pattern of research that requires the consumer to weigh not only the veracity of the findings per se, but also the qualifications of the researcher as well. Research by a non-expert in school law is widely discounted, while even a subjective pronouncement by a recognized authority may be acceptable.⁵ Consumers of empirical findings must be aware that the results of this research lacks dependability in predicting outcomes whether done by an amateur or an expert.

2. E.g., historical, philosophical, statistical, normative-survey, and the like. See generally C. SAX, *EMPIRICAL FOUNDATIONS OF EDUCATIONAL RESEARCH* 119 (1968).

3. According to the *Encyclopedia Britannica* in Volume eight at page 347, while empiricism was not unknown on the European continent, it was the dominant trend in Great Britain. The phrase "British empiricists" is commonly used to refer to Locke, Berkeley, Hume and their lesser followers, whose unmistakable influence on first British and later American jurisprudence cannot be taken lightly.

4. See G. SAX, *supra* at note 2. The author maintains that "education will not be regarded as a profession until its practitioners have mastered these (pure research) skills." Apparently others have had similar doubts about educational research, indicating that in a very real sense, empirical research is almost the only type of research open to those in educational law.

5. This researcher pleads no immunity to this charge. Since "expert" witnesses may express opinions in courts of law, while others may not, empirical findings are increasingly being introduced there even though there is some question as to their verifiability in fact or efficacy as predictive instrumentalities.

Before concluding that empirical research related to law and education is unreliable and should be scrapped, consider what life would be like without it. In the nature of things, decisions must be made, schools must open, textbooks must be procured, teachers and other employees hired, and reports made. There is no waiting for the final results of any research because the business of education must go on. Judges are called upon to decide educational issues. Although they are showing a growing reluctance to do this, perhaps because the research gives them little predictability of the consequences, there seems to be no other way than judicial activism to resolve an educational problem unless local officials show an inclination to solve local problems locally. There may be an improvement with the way legislatures are beginning to cope, witness the recent legislation on higher standards for both teachers and students. The wonder is that with such a lack of predictability, schools are doing as well as they are. The air of optimism that has permeated educational thinking throughout our nation's history still is alive and well and quite apparent in the literature.

Just so long as the conclusions reached in empirical research are not considered as final and/or immutable, they serve a useful purpose to decisionmakers mainly because they represent an interchange between others with similar problems. Reading between the lines, there is always the implicit warning that what we have here is subject to later developments, so do not be too sure that any decision you will make can be considered an end to it all.

The object decisionmakers must focus on, therefore, is a moving target. Is it a slow-moving moose, or a speeding beer truck? In some instances where the law and education come into contact, it is one, sometimes the other. The problem is to find which is which and adjust the sights accordingly.

Studies in education follow the general methodological pattern of science. A problem is posed, data are collected, a hypothesis is posed and tested, and conclusions are drawn.⁶ Systems analysis merely added steps to this process leaving as before an open-ended process that permits return to the beginning for a new start in each instance.⁷ This gives rise to the tacit admission that if at first we don't succeed, we may try, try again until it works.

This tendency toward pragmatism is a product of the school of thought headed by William James and C. S. Peirce. James wrote that a

6. Often modified into the so-called normative-survey method.

7. Determination of need, definition of objectives, identification of constraints, generation of alternatives, analysis and selection of one alternative, development of pilot implementation, evaluation and feedback comprise the eight step process.

belief or theory is true if it "works" or if it "pays."⁸ James' theories were popularized early in this century through his writings and teaching. Unfortunately, his later differences with Peirce (1839-1914)⁹ caused pragmatism to be subjected to scathing criticism from philosophers of both the realist and idealist schools. Despite its low rating, however, many studies examined for this chapter were of the "if-it-works, it's-good" school of research.¹⁰

Pragmatism is apparent in the modern saying, "You cannot argue with success." No doubt, educational decision-makers borrow heavily from business officials, whose "bottom line" theory that if a company is making money, it must be doing something right, leading to the rule of thumb that if it's not broke, don't fix it.¹¹

Observation on methodology based on experience gained in doctoral research studies of school law suggests a workable method called *historical-legal research*. This approach uses a time line, broken down into past, the present, and the future. When applied to a problem in educational law, such as the legal responsibility of parents for the vandalism of their offspring, the problem is first examined as it developed in the past. The current status of the law (legislation, case law) is then examined, leading to a discussion of possible developments in the future. Thus, the researcher using this method draws together in one study the other findings on the problem, the law relating to its solution, and discusses possible trends toward its resolution. In a large sense, most of the articles reviewed for this chapter were in effect the study of a particular legal problem and followed this method in its analysis.¹²

A communication system is in place which apparently is subscribed to by those who write educational law articles or publish reports concerning the legal aspects of education. One evidence of this interchange of ideas is the fact that there is surprisingly little duplication of research, leading to the conclusion that prospective legal researchers know what has been already researched and do not plunge in where the field has been preempted by earlier studies. Further evidence of the system exists where the names of writers and researchers are noted more than others. Evidently, some prolific writers spend a lot of time in pursuing legal

8. W. JAMES, *DICTIONARY OF PHILOSOPHY AND PSYCHOLOGY* (J. M. Baldwin, 1902).

9. See generally 5 *COLLECTED PAPERS OF CHARLES SANDERS PEIRCE* 464 (C. Hartshorne & P. Weiss eds. 1935).

10. The cost-benefit studies are a prime example.

11. Only one step removed from Luten's observation that it's not so hard to lift yourself by your bootstraps once you're off the ground. See generally P. DICKSON, *THE OFFICIAL RULES* (1978).

12. An example of a doctoral study along these lines is M. Severino, *School Vandalism: Legal Implications* (University of Denver, unpublished doctoral diss. 1971); in *NOLPE'S EMERGING PROBLEMS IN SCHOOL LAW* (NOLPE 1971).

research while others spend occasional time on this pursuit. Finally, the studies are heavily weighted in favor of assessments of compliance with selected United States Supreme Court decisions or with the question of their impact on educational decisionmaking in general. Many of the articles written in the past year consist of case comments on a particular leading case with consequential implications for the educational practitioner.¹³

A MODEL FOR SOCIAL CHANGE

The dynamic problem of how the law changes over time is involved in either a compliance or impact framework. The model by which this change takes place is now well-settled, a by-product of the civil rights movement. First, a minority individual or class of deprived individuals challenges its treatment in court and wins. Second, a period of time elapses during which the decision is being enforced and new adjustments made in the treatment of the minority individual or class. Finally, over time, the new value is accepted by the majority and enacted into law through majoritarian legislation by the Congress or the various legislatures, becoming in effect official governmental policy on a national scale.¹⁴ Such legal civil rights issues as desegregation of the schools, use of public moneys for private and parochial schools, and the legality of Bible reading and prayers in schools are examples of the maturation process by which a minority point of view in time becomes legitimized and finally emerges as official national policy.

Ordinarily, the time consumed in going from step one to step three is a decade, the time that elapsed between *Brown v. Board of Education*¹⁵ in 1954 and the passage of the Civil Rights Act of 1964.¹⁶ However, time necessary for full compliance must vary with each issue. For example, the process was shortened considerably on the question of whether a school district could legally bar educably mentally retarded children because there was no program designed to meet their needs.¹⁷

13. Compliance studies purport to measure the extent to which decisionmakers are in accord with the opinions of the court or statutory enactment, whereas the so-called "impact" studies assess the effects of such case law or legislation on educational practice in general. See, e.g., H. Lufner, *Unintended Impact of Supreme Court School Discipline Decisions*, in CONTEMPORARY LEGAL ISSUES IN EDUCATION 102-105 (McGhehey/NOLPE 1979).

14. M. NOLTE, HOW TO SURVIVE IN TEACHING: THE LEGAL DIMENSION, 19 (1980).

15. 347 U.S. 483 (1954).

16. 42 U.S.C. § 1971 2000a (1964), 42 U.S.C. § 1975(a) (1964), 28 U.S.C. § 1447 (1964).

17. Only three years elapsed between *Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pa.*, 343 F. Supp. 279 (E.D. Pa. 1972) and the passage of P.L. 94-142, the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 (1975), a much shorter legitimization period than for the earlier desegregation issue.

Judging how long a particular issue will consume before it runs its course is difficult if not impossible. The issue of school desegregation is still in the process.¹⁸ Sociological researchers tend to speculate that at least one generation must pass before far-reaching changes can come in any society. Since desegregation as an issue is thirty years old next year, this estimate may be an underestimation.

CURRENT REPORTING ON SCHOOL LAW

If we can accept that time is an element in the process of societal change, the remaining dimension must then become the substantive classification of the issues themselves. What method of classification can be found broad enough to include these educational-legal problems that face decisionmakers today? Reference to written sources gives little enlightenment. For example, *Education Index* lists such challenges under the heading of "Actions and Defenses," while the *NOLPE School Law Reporter* distinguishes cases in higher education from those related to elementary and secondary schools, then categorizes these in turn into categories like tort liability, control of students, negotiations, etc. The *Yearbook of School Law* spotlights affected groups, such as employees, students, and school boards. A more detailed system of classification is employed by *West's Education Law Reporter*¹⁹ while the Educational Resources Information Center (ERIC) makes use of a thesaurus.

Several sources such as the *NASSP Bulletin* and the *American School Board Journal* report school law developments from the standpoint of a particular category of decisionmakers.²⁰ The monograph series isolates a particular legal problem and explores it in depth.²¹ Reutter's 1982 work analyzes the impact of Supreme Court decisions on educational practice over time.²² *West's Education Law Reporter* publishes articles and comments on selected cases in its bi-weekly issues.²³ While all these

18. Plaintiffs in *Brown v. Board of Educ.*, 84 F.R.D. 383 (D. Kan. 1979) were successful in reopening the original case some 25 years after it was decided in 1954, even though they were not the original plaintiffs to the action. The court ruled that the original case had never been closed.

19. See Vol. 12, No. 3 WEST'S EDUC. L. REP. X-XXV (Sept. 22, 1983) for a full explanation of this more comprehensive system of classification.

20. For principals, e.g., W. St. John, *Documenting Your Case for Dismissal With Acceptable Evidence*, 67 NASSP BULL. 104 (Oct. 1983); for school board members, B. Sender, *Don't Ask the Law to Shield You From Tax Credits*, 170 AM. SCHOOL BD. J. 25 (Oct. 1983).

21. M. McCarthy, *DISCRIMINATION IN PUBLIC EMPLOYMENT: THE EVOLVING LAW* (NOLPE Monograph 1983).

22. E. REUTTER, JR., *THE SUPREME COURT'S IMPACT ON PUBLIC EDUCATION* (Phi Delta Kappa and NOLPE 1982).

23. In its first 45 bi-weekly issues dating back to November, 1981, some 60 widely ranging articles and comments on school law have been published. See also SPECIALTY LAW DIGEST: EDUCATION published monthly by the Bureau of National Affairs, Washington, D.C. which similarly focuses on target groups.

classification systems are helpful, they still leave the researcher with less than an all-inclusive scheme broad enough to encompass every educational-legal research study within its fold.

More than two dozen reports on the current status of the public schools have appeared within the past twelve months. While these are not strictly legal studies as defined here, they do represent national concern with America's continuing preeminence in commerce, industry, science and technology depending as it does on education.²⁴ Their legal implications must be reserved for later researchers.

A SYSTEM FOR CATEGORIZING RESEARCH

Inasmuch as the sources reporting legal/educational research are uncoordinated and widely scattered, the researcher can never be entirely certain that everything has been included. This chapter is a prime example: assurance is lacking that it is a comprehensive coverage of all the legal studies produced within the past 12—18 months. The ideal system would not only categorize educational law studies and other research as to content, but would also yield other information, such as the extent to which compliance has been achieved in practice. One dimension would be that of movement, of process over time, while the other would represent content, or substance, the substantive dimension. Furthermore, the system would be objective in nature and easily understood so that researchers using it would reach similar findings. Finally, it would be flexible enough to allow for further developments in the law as they occur.

For purposes of discussion, imagine that the time element measurement mentioned above might form one axis of the grid.²⁵ This is the process by means of which minority law becomes in time majority law and national policy. The middle step is gradual acceptance ("legitimization") of the idea in the minds of those affected. It is the process used by the courts since 1954²⁶ and has become a recognized part of our social processes. There is evidence that it may become even more permanent than at first imagined.²⁷

24. The most notable of these reports was *A NATION AT RISK* published by the National Commission on Excellence in Education which aroused public sentiment toward improving schools as our first line of defense.

25. See note 12, *supra*.

26. *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954).

27. The acceptance by the Congress of the proposal to honor Dr. Martin Luther King's birthday the third Monday in January each year beginning in 1986 legitimizes non-violent protest as a part of the process by which a group's constitutional rights may be achieved over time. There is a moral dimension to justice and equality which permeates America's political action and causes Americans to do the right thing because it is the right thing to do. See generally G. Nicolosi, *The Second American Revolution*, 78 *LIBERTY* 15 (July-Aug. 1983) (the Republic needs its prophets of dissent and hope).

A caveat is necessary, however, in the use of the process side of the compliance grid. First, the categories do not represent calibrated segments of time over which change takes place. Second, some legal problems in education fail to reach Step 3, the legislative stage, or if they do, are subject to return to Step 1 for "re-cycling." Third, the middle step representing "legitimization" is imprecise, since it may vary with each different legal problem examined. Despite these limitations, the three-step process dimension can be useful in measuring the approximate compliance necessary for a particular problem in education.

A similar caveat is sounded for the content (substantive) dimension of the grid. Here the paradigm is that of the five major revolutions convulsing society in modern times (*see* Table 1). The history of mankind is

TABLE 1*
Major Revolutions Affecting American Education
(and still in progress)

Name of Revolution*	Beginning Century	Freedom Sought	Current Holdover in Schools
Reformation	16th	Freedom from religious domination	Separation of church and state issues
American and French	18th	Freedom from political tyranny	Involvement of public employees in politics
Industrial	19th	Freedom from economic exploitation	Right to work and have security
Automation (Atomic Age)	20th	Freedom from labor's yoke	Impersonality of the urban school; education moving toward mechanization
Revolution of Rising Expectations (Civil Rights)	20th	Freedoms included in the Bill of Rights	Challenges to traditional ways of operating schools

* These *irresistible* social forces, once in motion, became more and more difficult to control or direct, so that mankind, while the beneficiary of freedoms won, nevertheless seemed less and less able to direct, control and manage the ultimate results of their driving force. It should be emphasized that the effects of these revolutions are not confined to education alone, but extend to every aspect of modern life. The result, as Archibald MacLeish has stated, is that Americans are *frustrated*, although nowhere else are people more affluent, more free, or more powerful in terms of the amounts of power available to each person within the nation.

Change, whether fast or slow, is *directional* in that it moves from the *status quo* toward uncharted depths not yet imagined. Thus, the law (which man uses to help him control and manage change) can be either an *anchor* or a *sail*. Frightened by the uncertainty of change, man turns to black magic or science in an effort to forecast the future, and lessen the impact of change. But even science lacks the comfort of predictability: since Hiroshima, mankind has come to realize that science regrettably lacks a conscience.

* From M. Chester Nolte, *Duties and Liabilities of School Administrators*, (1973) at 56.

the story of man's unquenchable thirst for freedom accompanied by a search for infallibility. Thus, Luther's Reformation was the search for religious freedom; an infallible pope was replaced by an infallible Bible. The American and French revolutions were attempts to obtain political freedom; an infallible king was replaced by an infallible document of rights. The Industrial Revolution in turn centered on economic freedom, the technological revolution was a struggle for freedom from the yoke of labor, while the more recent civil rights movement sought individual freedom for the disadvantaged. These great movements, still in progress, changed not only the schools but the entire society around the globe. The legal problems arising today can be categorized as either religious, political, economic, technological/urban, or civil in nature. The grid is helpful in obtaining an approximation of the extent to which these larger movements have run their course. To the extent that full freedom goals have been achieved in each of the movements, the grid will measure their status at any given point in time.

The following listings are not intended to be exhaustive, but merely illustrative of the kinds of actions and defenses that might be subsumed under each heading.

Religious

Home instruction • Tuition tax credits • Vaccination • Flag salute/national anthem • Prayers in school • Bible reading • A moment of silence • Creche/religious displays • Christmas programs • Censorship (where appropriate) • Use of schools by prayer groups • Display of Ten Commandments • Lemon test • Released/shared time programs • Religious holidays • Secular humanism • Textbook purchases • First Amendment

Political

Powers of local boards • Teachers/employees/first class citizens • Freedom of speech/press • Discriminatory practices • Right to vote/hold office/be politically active • Faculty evaluations • Administrative remedies • Nepotism • Due process/equal protection in exercising political rights • Rights of individual board members • Elections • Public relations • Sunshine laws/executive sessions • Ministerial actions of boards

Economic

Collective bargaining rights of employees • Unfair labor practices • Wages/hours/conditions of employment • Equal pay for equal work • Back pay/call back rights • Master agreement matters • Fact finding/mediation/arbitration • Seniority rights • Sovereign immunity of boards/districts • Teacher dismissal/re-employment • Insurance/finance/bonds/budgets/bidding • Contractual issues • Group use of school buildings • School construction

Technological

Teaching methodologies/curricula • Right to be oneself/dress/ appearance • Tracking/ability grouping • Age discrimination • Urban problems/attendance/exclusion • Impersonal relationships • Right to an education/to know/to be informed/to learn

Civil Rights

Alien/handicapped/disadvantaged • Civil Rights Acts/Section 1983 suits • Constitutional torts • Due process of law/equal protection • Busing/desegregation • Suspension/expulsion/corporal punishment • Board procedures vis-a-vis children/employees/others • Bill of Rights

It should be emphasized that none of these classifications is mutually exclusive; there is some overlapping. However, there is the possibility that by prior arrangement, a system could be agreed upon as to which category each type of legal problem or issue might fall. This would standardize the grid and make it easier to use by researchers seeking to determine the general status of any particular issue in school law. Researchers would be able to place an issue on the grid according to the extent to which that issue had become "settled, undisputable law," as postulated by the Supreme Court in *Wood v. Strickland*²⁸ and modified in *Harlow v. Fitzgerald*.²⁹ Thus, studies on how well an issue had become generally accepted could be conducted on a discipline-wide basis.

How reliable is the grid in showing progress toward full compliance? It is not intended as a precise categorical system since it is obvious that the axes are not ordinal, much less drawn to interval scale. Rather, the grid is intended as a broader view of categories of freedom cases than is presently available. It can be held in mind and become an operational "rule of thumb" paradigm useful to the researcher in classifying any particular legal issue in education at first glance.

Perhaps its most convenient usage would be to provide "cubby-holes" in which the legal researcher could temporarily file legal issues on the way to a more in-depth examination, moving them from one box to another as progress is noted. The grid is not intended to be a final, comprehensive pattern for analyses of educational law problems but is offered in the hope that it may prove useful to those who are confused by the endless flow of school law that comes along daily.³⁰

28. 420 U.S. 308 (1975).

29. 102 S. Ct. 2727 (1982). The decision eases the standard for determining school board members' liability under 42 U.S.C. § 1983 for alleged violation of constitutional rights. Henceforth, an official's good faith will be judged on a purely objective standard, i.e., whether there is a violation of rights which were clearly established at the time the action occurs, or of "settled, indisputable law."

30. Judge Hand referred to the passing scene as "the flux that passes before him" upon which a man hopes sometimes in vain to impose some mark of himself even though he always must be "aware of the odds against him." See note 1, *supra*.

COMPLIANCE GRID

		PROCESS		
		Step 1 (lex non scripta)	Step 2 (legitimization)	Step 3 (lex scripta)
SUBSTANCE	Religious			
	Political			
	Economic			
	Technological			
	Civil			

The horizontal axis represents the process by which a minority ruling of the courts progresses from minority to majority law while the vertical axis represents the five great revolutions still moving through the schools. The grid permits the researcher to plot the relative status of any legal question insofar as it represents "settled, indisputable" law outlined in *Wood v. Strickland*, 420 U.S. 308 (1975) and modified in *Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982).

If it lacks something, Judge Hand's words come again to mind. "I know as well as you that it is not of the highest quality; but I did put into it whatever I had, and that was the game I started out to play."³¹

CONCLUSION

Pure research in school law is not possible, since the researcher must rely on inquiry that can be verified by experience and observation in the field. The studies produced in the past year tended to fall into classes: compliance, accountability, impact, cost-effectiveness, Supreme Court decisions, and the process by which minority law eventually becomes legitimized emerging as majority law in the form of national policy.

The studies leave much to be desired. Of uncertain quality, widely scattered in the literature, tending toward subjectivity at times, accepted on the reputation of the researcher, and ungoverned by a comprehensive categorization scheme, they are confusing even to those for whom they are written—the nation's educational decisionmakers.

A partial solution to this problem might be development of a broader system for categorizing educational legal issues over time. One dimension would be a three-step process by which minority rights are transformed into enabling law and become national policy, while the other dimension would consist of the five major revolutions affecting the schools in the modern era.

The grid would enable researchers to plot the progress of any particular legal issue over time from inception to its general acceptance as "settled, indisputable law."

31. *Id.*

The Changing School Finance Scene: Local, State, and Federal Issues

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The purpose of this chapter is to provide an overview of recent school finance litigation at the local, state, and federal levels. The first section addresses legal challenges to state school finance systems and reviews decisions from Arkansas, California, Colorado, Georgia, Michigan, New York, and West Virginia. In the sections that follow, various local and federal finance cases are examined, and challenges to public aid strategies for nonpublic schools are highlighted.

CHALLENGES TO STATE SCHOOL FINANCE PROGRAMS

Little doubt exists that the judiciary has played a significant role, either directly or indirectly, in school finance reform. Educators' views of issues such as equity, equality, appropriateness, and adequacy have been and continue to be shaped by judicial opinions. Regardless of how one views judicial intervention in the policy-making arena, the impact is undeniable. The financing of public education has been forced to the forefront of political debate in many states either through court orders or anticipation of potential litigation.

In this section an overview of recent school finance reform litigation is presented. During the early 1980s courts have been quite active but the decisions have not been particularly encouraging for reformers. One of the most shattering defeats was the *Levittown* decision.¹ Preceding this

1. Board of Educ., Levittown Union Free School Dist. v. Nyquist, 453 N.Y.S.2d 643 (N.Y. 1982), cert. denied, 103 S. Ct. 775 (1983).

decision, the state supreme courts in Colorado and Georgia rendered similar decisions upholding their states' school finance systems.² Following the New York case, the Supreme Court of Maryland upheld its state school finance program.³ These defeats, however, in no way signalled the demise of legal challenges. In fact, during this same period West Virginia and Arkansas declared their systems unconstitutional,⁴ and new lawsuits continued to be filed.⁵

Challenges to state methods of financing schools remain state constitutional issues. The United States Supreme Court's declaration in 1973 in *San Antonio Independent School District v. Rodriguez* that education is not a fundamental right explicitly or implicitly guaranteed by the federal constitution effectively placed all subsequent legal challenges to funding schemes at the state level under individual state constitutions.⁶ The lack of stringency in the federal equal protection analysis enables a state to satisfy the federal constitution by simply showing that its action was rationally related to a legitimate state purpose. Since 1973 the Supreme Court has consistently rejected requests to review state school finance laws.⁷ The high court's ruling in *Plyler v. Doe*, striking down a Texas law that barred undocumented aliens from public education, provided fleeting optimism that the Court might reconsider state funding schemes under a more stringent standard of review than the rational basis test.⁸ In the Texas case, the Court reasoned that education is entitled to a special status among governmental benefits, thereby requiring states to prove that classifications affecting this interest advance a substantial state goal. Although this heightened equal protection review standard would not be as rigorous as requiring a state to show a "compelling interest" for allowing significant disparities in educational opportunities, it would certainly pose a more formidable barrier than simply requiring the articulation of a rational state objective. The Supreme Court, however, declined to apply this standard to cases involving school funding. In January 1983, the Court refused to review the New York *Levittown* decision, stating,

2. *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981).

3. *Hornbeck v. Somerset Cty. Bd. of Educ.*, 458 A.2d 758 (Md. 1983).

4. *Dupree v. Alma School Dist.*, No. 30 of Crawford Cty., 651 S.W.2d 90 (Ark. 1983); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979).

5. E.g., *East Jackson Public Schools v. State of Michigan*, No. 82-27983-CZ (Jackson Cty. Cir. Ct. filed 1982); *Jesseman v. New Hampshire*, No. 82-E-038 (Merrimack Cty. Super. Ct. filed 1982); *Webby v. King*, No. 78-179 (Me. filed 1982).

6. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

7. *Board of Educ. of Cincinnati v. Walter*, 390 N.E.2d 812 (Ohio 1979), cert. denied, 444 U.S. 1015 (1980); *Washakie Cty. School Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980), rehearing denied, 606 P.2d 340 (Wyo. 1980), cert. denied, 449 U.S. 824 (1980).

8. *Plyler v. Doe*, 102 S. Ct. 2382 (1982).

as in previous appeals, that there was no substantial federal question involved in the case.⁹

As a result of the federal stance, litigation attacking states' methods of funding public schools are based on state constitutional equal protection guarantees and/or education clauses. Questions raised in these cases relate to issues of equity, adequacy, local control, expenditure disparities, minimum level of education, equality of educational opportunity, and appropriateness of program. Courts have attempted to provide definition to these concepts and assess whether individual state constitutional mandates have been met.

Constitutional Systems

Most state courts have followed the lead of the United States Supreme Court, adopting a posture of judicial restraint. Education is viewed by these courts not as a fundamental right under the state constitution but as a policy issue to be resolved in the legislative arena. The primary concern in the case is whether the state is providing a minimum education to all students. No attempt is made to define standards or program components. Recent decisions in Georgia, Colorado, New York, and Maryland exemplify this posture.

The Georgia Constitution specifies that the state legislature shall provide for an adequate education. In the Georgia case, *McDaniel v. Thomas*, the state supreme court accepted the trial court's conclusion that "similarly situated children receive very different amounts of educational resources as a result of disparities among school districts in taxable property wealth per pupil. . . . The inequalities in the school finance system deny students in property poor districts equal educational opportunities."¹⁰ According to the court, the duty to provide an adequate education would be abridged only if evidence were introduced to show that students in a district were actually deprived of basic educational opportunities. Similar to the Georgia high court, the Colorado Supreme Court in *Lujan v. Colorado State Board of Education* held that the constitutional mandate requiring the state to establish "a thorough and uniform system of free public schools" does not elevate education to a fundamental right that would require absolute equality in educational services and expenditures.¹¹ Rather it was viewed merely as a mandate for establishing a free education system. No attempt was made to define a minimum level of education in Colorado except

9. Board of Educ., Levittown Union Free School Dist. v. Nyquist, 453 N.Y.S.2d 643 (N.Y. 1982), cert. denied, 103 S. Ct. 775 (1983).

10. *McDaniel v. Thomas*, 285 S.E.2d at 161.

11. *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1983).

to note that no child was being denied an education. The New York high court also found its state in compliance with the constitutional mandate to provide for a system of free public schools. The court reached this decision with little difficulty in view of the evidence that only two states exceeded New York in expenditures per pupil. The Maryland high court in April 1983 declared that "the State's school finance system is not depriving, interfering with, or impinging upon, much less absolutely eliminating any child's right to an adequate education."¹² Emphasizing that a minimum education was being provided the court stated: "Simply to show that educational resources available in the poorer districts are inferior to those in the rich districts does not mean that there is insufficient funding provided by the State's financing system for all students to obtain an adequate education."¹³

In assessing whether education was a fundamental right, these courts rejected the Supreme Court's test in *Rodriguez* (i.e., whether education is explicitly or implicitly guaranteed in the Constitution). The New York court concluded that the state constitutional mandate to provide education does not "automatically entitle it to classification as a 'fundamental constitutional right.'"¹⁴ The court noted that the rights guaranteed in the federal constitution have greater significance because the tenth amendment limits the scope of the Federal Constitution to delegated powers. In contrast, the New York constitution does not contain such a provision, and many areas and subjects appear that clearly would not be classified as a fundamental right. Similarly, the Maryland and Georgia courts found that this was not a meaningful analysis because of the range of rights and interests addressed in their constitutions.¹⁵

State supreme court activity has been the primary focus of public attention, but litigation continues in lower level state courts. At the trial court level in late 1982, a challenge to the Michigan school finance system was dismissed in *East Jackson Public Schools v. State*.¹⁶ The Michigan system had survived earlier judicial review in 1973 when the state supreme court dismissed a case, saying that review had been "improvidently granted."¹⁷ The new case charged that the system violates the state constitutional guarantees of equal protection and education because available educational opportunities are dependent on the local

12. Hornbeck v. Somerset Cty. Bd. of Educ., 458 A.2d at 786.

13. *Id.* at 780.

14. Board of Educ., Levittown Union Free School Dist. v. Nyquist, 453 N.Y.S.2d at 650.

15. Hornbeck v. Somerset Cty. Bd. of Educ., 458 A.2d at 786; McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981).

16. No. 82-27983 (Jackson Cty. Cir. Ct. 1982), *supra* note 5.

17. Milliken v. Green, 212 N.W.2d 711 (Mich. 1973).

property tax base. The case has been appealed to the state supreme court and oral arguments were heard in November, 1983.

Although the United States Supreme Court upheld the Texas school finance program under the federal constitution, a new suit is being prepared to challenge expenditure disparities under the state constitution. Poor school districts are alleging that state aid has not corrected substantive spending differences and that wealth disparities have worsened since *Rodriguez*.

Unconstitutional Systems

Recently only two state supreme courts have declared their school funding programs unconstitutional—West Virginia and Arkansas. The West Virginia decision has been the focus of considerable attention. In 1979 the state high court declared the system unconstitutional under the education "thorough and efficient" clause as well as the equal protection guarantee.¹⁸ According to the court, the constitutional mandate to provide education required schools to satisfy *high quality* statewide educational standards, not simply provide a minimum educational program. Equal educational opportunity was couched in terms of substantive programs and results, "no matter what the expenditures may be."¹⁹ "Thorough and efficient" was defined as an "efficient system of schools that develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically."²⁰

The case was remanded to determine if interdistrict disparities were a result of the state funding scheme. The lower court was instructed to review the state foundation program and assess whether the state legislature was providing a thorough and efficient system of education.

In May, 1982, the trial court judge handed down a 244-page decision that is one of the most specific and detailed decisions to date.²¹ The court set up extensive standards of a high quality education addressing curriculum, personnel, facilities, materials, and equipment and found West Virginia schools woefully inadequate. As indicated, most courts have deferred to legislative bodies to give meaning and substantive content to an adequate or basic education. The West Virginia trial court judge, through expert witnesses, outlined in precise details these components. For example, some of the requirements included:

18. *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979).

19. *Id.* at 865, n.7.

20. *Id.* at 877.

21. *Pauley v. Bailey*, No. 75-1268 (W. Va. Kanawha Cty. Cir. Ct. May 11, 1982).

curriculum supervisors in each subject area; pupil/teacher ratio not to exceed 20:1 in K-2; 25:1 in 3-12; specified number of square feet per pupil in school facilities; essentials in educational offerings: 100 minutes per week in art (elementary), art 3 periods per week (middle/junior); foreign language three times a week beginning in the third grade; math 55 minutes daily (elementary 1-4), 275 minutes per week (grades 5-8), 225 minutes per week (grades 9-12).

Similar detail continues for all curriculum areas. Applying these standards, the court found the evidence indicated clearly that property poor districts were unable to offer high quality educational programs. To correct education deficiencies, the judge opted to appoint a special commissioner to work with the legislative and executive branches to develop a master plan pursuant to the court's standards. In addition to striking down the school finance system, the judge also declared the state tax system unconstitutional for allowing substantial variations in property valuations among the counties. Full value assessments were ordered. (Statewide assessments on the average were as much as twenty-eight percent of full market value; some county assessments were as much as twenty-five years out of date). The state tax commissioner was ordered to develop a plan to correct the assessment deficiencies.

Predictably, this decision created considerable backlash. Within a month of the original decision, the trial court judge issued a supplemental order clarifying the ruling.²² The judge stated that he wanted to make it crystal clear that the master plan was a *proposal*, a *suggestion*, that would conform to the guidelines established at the request of the supreme court. Furthermore, he pointed out that the court cannot and does not have the power—or the jurisdiction—to demand that the legislature adopt a particular plan. He did note, however, that it was a judicial function to determine if the enacted legislation meets the constitutional mandate.

The West Virginia State Board of Education decided not to appeal the case. At the request of education officials, the judge appointed a 99-member commission rather than a special master. A comprehensive education plan recommending extensive school finance reforms costing \$1 billion was completed by this group in December, 1982 and ratified by the state judge in March, 1983.²³

22. *Id.*, Supplemental Opinion (May 21, 1982).

23. The ability of state and local officials to raise additional revenue for education was enhanced by the passage of two tax-related educational amendments in November, 1982. One provides that local voters will be able to pass "excess levies" and bond issues by a simple majority rather than a three-fifths majority, and the second amendment allows the state legislature to pass a statewide property tax levy for school funding.

In *Dupree v. Alma School District No. 30*, the Supreme Court of Arkansas held that the state public school financing system violated equal protection guarantees and the requirement that the state provide a suitable and efficient system of schools.²⁴ The court did not determine whether education is a fundamental right, but instead concluded that there was no legitimate state purpose to support the system. The court noted that it "bears no rational relationship to the educational needs of the individual districts, rather it is determined primarily by the tax base of each district."²⁵ In the court's view, the principle of local control was inadequate to justify the existing inequities because equalization could be improved without diminishing local control. Furthermore, quoting *Serrano*, the court found the concept of local control to be a "cruel illusion" for poor districts. (Interestingly, this case was reviewed by the supreme court only because three wealthy school districts intervened to fight for the present system. The original state defendants agreed with the trial court's ruling that the system was inequitable and chose not to appeal.)

Enforcement of Court Decisions

Plaintiffs in four states have returned to the judiciary to enforce the implementation of earlier supreme court rulings. In California and Connecticut, the original decisions were reopened. Plaintiffs in California argued that expenditure disparities have increased since the court's earlier order to reduce spending disparities now are not wealth-related but caused by variations in operating costs and local priorities. A superior court judge agreed with the state in May, 1983, finding the state in compliance with the 1974 order.²⁶ When adjusted for inflation the \$100 difference is now \$191, and 93 percent of the children are enrolled in school systems within the "band." The judge concluded that the state no longer has a wealth-related system within the meaning of the original property taxes to state taxes. Last year the state paid 80 percent of the cost of education.

New suits have been filed in Washington and New Jersey. In *Seattle School District No. 1 of King County v. Washington*,²⁷ plaintiffs alleged that the legislature failed to meet the mandate of the 1978 supreme court decision to define and fund a basic education program. Judge Doran, who originally declared the system unconstitutional,²⁸ agreed

24. 651 S.W.2d 90 (Ark. 1983).

25. *Id.* at 93.

26. Memorandum of Decision, No. 1554 (Los Angeles Super. Ct. 1983).

27. No. 81-2-1713-1 (Thurston Cty. Super. Ct. 1981). See *Seattle School Dist. No. 1 v. Washington*, 585 P.2d 71 (Wash. 1978).

28. Judge Doran held that the state had a paramount duty to make ample provision for educating children of the state.

in May, 1983, finding that the state constitution prohibits underfunding of basic education.²⁹ Through low appropriations and budget cuts the state had not met its obligations. Under the new ruling, the state must fully fund all programs in basic education. New Jersey plaintiffs are awaiting a decision in *Abbott v. Burke*.³⁰ The new complaint alleges that the state continues to deprive children in poor urban school districts a thorough and efficient education. Disparities between low and high expenditure districts are even greater than they were prior to the original *Robinson v. Cahill*³¹ decision.

Overall, the pace of school finance litigation has not changed radically in the 1980s. As in the 1970s, the majority of state supreme courts rendering decisions have upheld state finance programs and a backlog of unresolved cases remain. Other factors related to school finance challenges, however, have changed. Unlike earlier years, the economic conditions of states is not as supportive of massive reform efforts. Budget surpluses do not exist to fund school finance reforms developed under court mandates, and tax increases do not appear viable. Furthermore, with public attention focused on educational excellence, it will be difficult to address equity concerns. Indeed, state programs developed to meet the demands for excellence may exacerbate existing inequities.

The nature of school finance decisions also may change in the 1980s as exemplified by the West Virginia and Arkansas decisions. As indicated, the West Virginia decision is a significant departure from earlier court orders in terms of its specificity. In the future, courts may follow this lead and take a more active role in structuring the educational program. As the Arkansas Supreme Court, other state courts also may find it is not necessary to declare education a fundamental interest under the state constitution, holding instead that the program cannot meet even the lenient rational basis test.

LOCAL FISCAL ISSUES

School boards facing budget constraints at the local level have found many of their efforts to reduce expenditures or increase revenue challenged under state and federal laws. Some of the actions resulting in litigation have been prompted by decisions affecting areas such as transportation, length of school week, summer school, and tuition charges.

29. See, *supra* note 27, No. 81-2-1713-1 (Thurston Cty. Super. Ct., April 29, 1983).

30. No. C-1893-80 (Super. Ct. of N.J., Chancery Div., Mercer Cty.). Note: Case was dismissed by trial judge on November 15, 1983, and plaintiffs have appealed directly to the state supreme court.

31. 303 A.2d 273 (N.J. 1973).

A Pennsylvania school district offering half-day kindergarten sessions reduced its budget by eliminating round-trip kindergarten transportation. Instead of employing special buses and drivers for the midday bus routes, the board limited services to transportation only one way on the regular elementary buses. This decision required parents to provide transportation either to or from school depending on which session their children attended. A class action complaint alleging violation of the fourteenth amendment was brought by parents who could not afford to transport their children. The Third Circuit Court of Appeals held that neither the due process clause or equal protection clause was violated.³² Since education is not a fundamental interest under the federal constitution, the local district's decision was supported by a rational basis—a considerable cost savings to the district. The United States Supreme Court refused to issue a stay in December, 1982 and denied appeal in February, 1983.³³

A four-day school week may be an effective means of lowering school costs. Districts incurring significant transportation expenditures especially may find this an attractive alternative. A decision from the Supreme Court of Wyoming this year, however, indicates that state laws may pose significant barriers to such local initiatives.³⁴ The high court interpreted the plain meaning of the Wyoming statutory requirement of 175 school days to mean 175 *separate school days*. Prior to implementation of the plan the local board had sought and received approval for a pilot project from the state board of education and the attorney general. Parents, however, contested the action because they felt further study was needed before implementation. As in Wyoming statutory language may need to be modified in many states to allow flexibility in scheduling the school week.

While the Wyoming high court ruled that school districts must meet at least the state mandated minimum of 175 days, the South Carolina Supreme Court also found districts were not obligated to provide free schooling *beyond* the regular established school term.³⁵ The issue before the South Carolina court this year was whether a school district's imposition of fees for summer school violated the state constitutional obligation to deliver a system of free public schools. A unanimous state supreme court held that summer school charges did not violate federal or state laws. The lack of other sources of funds as

32. *Shaffer v. Board of School Directors of the Albert Gallatin Area School Dist.*, 687 F.2d 718 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 1209 (1983). It should be noted that Pennsylvania law does not require local school districts to establish a kindergarten program.

33. *Id.*

34. *Johnston v. Board of Trustees*, 661 P.2d 1045 (Wyo. 1983).

35. *Washington v. Salisbury*, 306 S.E.2d 600 (S.C. 1983).

well as the absence of a state requirement for summer school led the court to conclude that this was the only way the district could provide a summer program. As in many states, the majority of school districts in South Carolina offer summer programs on a fee basis.

Although states and local districts may not be required to provide tuition free summer schooling for regular students, courts are interpreting federal laws as requiring extended summer programs for certain handicapped students. The Fifth Circuit Court of Appeals in 1983 held that Mississippi's policy of refusing even to consider schooling beyond the 180-day school year violates the Education for All Handicapped Children Act.³⁶ Relying on the United States Supreme Court's decision in *Board of Education v. Rowley*,³⁷ the appellate court ruled that consideration must be given to the individual child's needs. Limiting the educational program to nine months would be inconsistent with determining the unique needs of an individual handicapped child. The Eleventh Circuit Court of Appeals agreed with this interpretation in a Georgia case, concluding that the law requires the state to consider individual needs for continuous education.³⁸ These cases are consistent with the judicial trend to strike down local and state restrictions on length of the school year for handicapped pupils.³⁹

Generally, local school systems charge nonresident students tuition fees. Under state laws, the school districts establish fees for students residing outside the district or residing in the district with someone other than a legal guardian. The Supreme Court last term reviewed such a Texas residency requirement in *Martinez v. Bynum*.⁴⁰ The Texas statute allows local school boards to deny tuition free schooling to a minor who lives apart from a parent or legal guardian for the primary purpose of attending the public schools in a particular district. In *Martinez*, Roberto Morales, a United States citizen by birth, left Mexico to live in McAllen, Texas, with his sister for the purpose of attending school. Since he was not living with a parent or legal guardian, the McAllen school district charged Roberto tuition. His sister challenged the policy as a violation of the fourteenth amendment. This case followed in the wake of *Plyler v. Doe* in which the Supreme Court invalidated another aspect of the same Texas statute (exclusion of undocumented alien children from the public schools).⁴¹ In the *Plyler* case,

36. *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983).

37. *Board of Educ. v. Rowley*, 102 S. Ct. 3034 (1982).

38. *Georgia Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983).

39. See *Battle v. Pennsylvania*, 629 F.2d 629 (3d Cir. 1980), cert. denied, 425 U.S. 968 (1980); *Yaris v. Special School Dist. of St. Louis Cty.*, 558 F. Supp. 545 (E.D. Mo. 1983); *Phipps v. New Hampshire Cty. Bd. of Educ.*, 551 F. Supp. 732 (E.D.N.C. 1982).

40. 103 S. Ct. 1838 (1983).

41. 102 S. Ct. 2382 (1982).

the Court, however, did recognize the legitimacy of a residency requirement for all children, including illegal alien children, stating that "a requirement of *de facto* residency, uniformly applied, would not violate any principle of equal protection."⁴² The Court in *Martinez* concluded that a bona fide residence requirement "furtheres the substantial state interest in assuring that services provided for its residents are enjoyed only by residents" and that quality local public schools are maintained.⁴³ The Texas statutory residency test was found to be more lenient than most traditional residency standards (to live in the district with the intent to remain indefinitely) in that it would be met as long as the child was residing in the district for *any purpose* other than school attendance.

School districts in several states have attempted to use state residency requirements to charge military families tuition since the federal government has reduced impact area aid. North Carolina law allows local school systems to charge tuition for children of families legally residing and paying taxes in another state and for children of military families if impact aid does not cover one-half of their educational costs. In May, 1983, a federal district court judge ruled that this law and board policy made pursuant to it intentionally discriminates against the federal government and is prohibited by the supremacy clause of the United States Constitution.⁴⁴ The defendant school board in this case had lost over 75 percent of its federal impact aid in the previous two years.

Last year the New Jersey Supreme Court also ordered a local school district to admit military dependent children tuition free. The New Jersey school district faced a 50 percent reduction in impact aid and claimed that military families should be charged fees since they are not legally residents of the state and have no intent to stay. The judiciary ordered admission without addressing the cost and funding issues.

The impact aid controversy has a different twist in Michigan. The United States Department of Education allows states with substantially equalizing funding formulas to count impact aid as part of a district's required local effort for state aid purposes. As a result, a district receiving impact aid appears wealthier and receives less state funding. Two Michigan districts filed suit last year against the state and federal governments to recover lost aid.⁴⁵ The case was dismissed, but the school systems have appealed.

42. *Martinez*, 103 S. Ct. at 1842 (quoting Plyler).

43. *Id.*

44. *United States of America v. Onslow Cty. Bd. of Educ.*, No. 82-97-Civ-4 (E.D.N.C. May 16, 1983).

45. *In re Pemberton School Dist.*, No Docket Number (N.C. Sept. 7, 1982).

46. *Gwinn Area Schools v. State*, No. 82-6125-CZ (Delta Cty. Cir. Ct. 1983).

Although this is not an exhaustive review of local school finance litigation, it does provide a cross section of fiscal issues. Such issues will continue to arise as districts attempt to initiate budget reduction measures and identify additional sources of revenue. In these instances, state laws will be paramount in construing local authority and responsibility. As evident from the cited cases, modifications may be needed in some state laws to expand fiscal management options. While all aspects of the school program are being scrutinized for potential reductions, services for special populations such as the handicapped may not only be exempt from cuts but actually require expansion.

FEDERAL AID ISSUES

Recent attention has been focused on two controversial issues at the federal level. First, the authority of the federal government to recover misspent Title I funds has been unclear and was addressed by the Supreme Court in 1983. A second issue creating substantial furor through the fall of 1983 was an order by a federal district court judge freezing department of education funds. This action resulted from the federal government's failure to fulfill its agreement to provide financial assistance for Chicago's desegregation plan. Also, a third area generating litigation in state and federal courts involves federal aid under the Payments in Lieu of Taxes Act.

Title I Recovery Authority

Last term the Supreme Court upheld the department of education's authority to collect misspent Title I funds from states.⁴⁷ The Education Amendments of 1978 gave the secretary of education recovery authority but federal appellate courts disagreed on whether funds misspent by states prior to 1978 must be repaid.⁴⁸ In *Bell v. New Jersey and Pennsylvania*, the states argued that the 1978 repayment collection power was prospective only. They maintained that prior to 1978 the secretary had two alternatives for noncompliance: funds could be withheld until compliance or applications could be denied if programs were not in compliance. In this case, the Court did not address whether the 1978 amendment was retroactive but rather concluded that the intent of earlier laws was that states should return misspent funds. Legislative history, the plain language of the Act, and congressional debate on the 1978 amendment were found clearly to support a right of recovery.

47. *Bell v. New Jersey and Pennsylvania*, 103 S. Ct. 2187 (1983).

48. *Pennsylvania v. Secretary of Educ.*, 662 F.2d 208 (3d Cir. 1981); *West Virginia v. Secretary of Educ.*, 667 F.2d 417 (4th Cir. 1981).

The Court was not receptive to New Jersey's proposal of a "setoff" (that is, the secretary would reduce future grants, and the state would operate fewer Title I programs). "It is hardly likely," the Court stated, "that Congress intended disadvantaged children to suffer twice: once when the state misspent the funds and once when the state cancels an otherwise eligible program because of the secretary's refusal to fund it."⁴⁹

The issue for New Jersey and Pennsylvania as well as approximately seventeen other states owing a total of \$64 million is not settled. Still pending before federal circuit courts is the question of whether the funds were actually misused by the states. In September, 1983, the Sixth Circuit Court of Appeals ruled in favor of the State of Kentucky.⁵⁰ The department of education audit finding against Kentucky of \$338,000 for supplanting state and local financial aid was overturned by the appellate court. The cited violation involved Kentucky's practice of allowing districts to provide self-contained classes for Title I students if they continued to spend the same amount of state and local funds as they would have without the classes. The department of education maintained that although district and school level effort was not reduced the Title I money did not benefit the disadvantaged students. The court, in ruling that Kentucky tried to meet the supplement rather than supplant rule, concluded that the regulations were not sufficiently clear.

Department of Education Funding Freeze

On September 24, 1980, the United States and the Chicago Board of Education signed a consent decree in which the Chicago Board agreed to develop a comprehensive desegregation plan and the federal government agreed to make every good faith effort to find and provide financial funds for implementation. A federal district court judge concluded in June, 1983 that the federal government had breached the decree and froze \$47.5 million in fiscal 1983 funds of the department of education and ordered the department to identify funds that could be made available for the Chicago plan, including funds that could be reprogrammed as well as funds from other federal agencies.⁵¹ The programs included in the fund freeze were Title IV desegregation aid, women's education equity, Follow Through, general assistance for the Virgin Islands, and Bell's discretionary fund. The freeze substantially disrupted these federal programs and drew nationwide protests from all sectors.

49. *Bell v. New Jersey & Pennsylvania*, 103 S. Ct. at 2193.

50. *Kentucky v. Secretary of Educ.*, 717 F.2d 943 (6th Cir. 1983).

51. *United States v. Board of Educ. of Chicago*, 567 F. Supp. 272 (N.D. Ill. 1983).

In September, 1983, the Seventh Circuit Court of Appeals upheld the freeze agreeing that the federal government had violated the agreement.⁵² Under the district court's order, the federal government's obligation is to: (1) "provide" any presently available funds; (2) "find" every available form of funds, by identifying excess or otherwise available appropriations for other purposes and (a) notifying Congress of the intent to reprogram such funds when they are in the same budget account, or (b) seeking congressional reappropriations of such funds from other budget accounts; (3) "find" funds by not failing to seek appropriations that could be used for desegregation assistance to Board, and by not attempting to rescind all such appropriations.⁵³

The department of education has gained control of a portion of the fiscal 1983 budget. Congress appropriated \$20 million in a temporary spending bill in September and the district court judge released \$20 million. The disposition of the remaining \$27.5 million will be determined after a trial to determine the extent of the federal government's financial duty to aid Chicago desegregation.

In Lieu of Taxes Aid

In 1976 Congress passed Title 31 U.S.C. § 1601, the Payments in Lieu of Taxes Act. Under this act, county governments receive payments in lieu of taxes for federally owned land. Interior regulations promulgated under the act exclude school districts from receiving direct payments. Two recent cases addressed whether states can compel counties to distribute funds to schools and whether interior regulations impermissibly deny school districts these funds.

A South Dakota law provides that "the county auditor shall distribute federal and state payments in lieu of tax proceeds in the same manner as taxes are distributed." Lawrence County refused to distribute these funds, and three school systems in the county that would have received 60 percent of the act's funds brought suit. The Supreme Court of South Dakota examined the plain language of the federal act which specifies that funds "may be used by such unit for any governmental purpose," and found the support of school districts to be a governmental purpose within the meaning of the law.⁵⁴ According to the court, if Congress had intended to exclude schools it could have included that prohibition in the law. The court concluded that state determination of distribution did not violate the Supremacy Clause

52. *United States v. Board of Educ. of Chicago*, 717 F.2d 378 (7th Cir. 1983).

53. *Board of Educ. of Chicago*, 567 F. Supp. at 283.

54. *Lead-Deadwood Dist. v. Lawrence Cty.*, 334 N.W.2d 24 (S.D. 1983), *petition for cert. filed*, 52 U.S.L.W. 3123 (U.S. Aug. 23, 1983).

since the action did not interfere with accomplishment of the federal law. The money was being distributed to the county (the unit of local government) and was being expended for a governmental purpose.

School districts in Arkansas brought suit challenging the Secretary of Interior's definitions under the federal act that precluded school district's from receiving direct payments in lieu of taxes. The act specifies that payments will be made to each unit of local government in which entitlement lands are located and further defines a unit of local government as "a county, parish, township, municipality, . . . or other unit of general government as determined by the Secretary" in accordance with standards established by the Bureau of Census [emphasis added].⁵⁵ Under the secretary's definition, other units of general government "excludes single purpose or special purpose units of local government such as school districts or water districts."⁵⁶ Since Congress did not specifically include school districts, an Arkansas federal district court held that the Secretary of Interior's actions were not unlawful or beyond his authority.⁵⁷ The federal court did note that evidence indicated Congress's intent that school districts should benefit from the funds but left equitable disbursement to the counties.

PUBLIC AID TO NONPUBLIC SCHOOLS

Public financial support to nonpublic schools (specifically parochial schools) continues to generate litigation as well as political debate. States have attempted to evade first amendment establishment clause limitations through a wide range of financial aid programs. These measures have included support such as textbooks, transportation, remedial instruction, testing, instructional materials, maintenance of facilities, and tax credits.

Probably the most controversial of the public aid strategies was reviewed by the Supreme Court in 1983. In a 5-4 decision the Court upheld a Minnesota tuition tax deduction law.⁵⁸ This decision has far-reaching fiscal implications for public education. Additionally, recent state and federal cases continued to scrutinize the operation of long standing aid programs such as transportation and textbooks.

Tuition Tax Deductions

In 1973 the Supreme Court struck down a New York income tax credit statute designed to provide relief for parents paying nonpublic

55. 31 U.S.C. § 1606(c).

56. 43 C.F.R. § 1881.0-5(b)(2).

57. *Altus-Denning School Dist. v. Franklin Cty.*, 568 F. Supp. 95 (W.D. Ark. 1983).

58. *Mueller v. Allen*, 103 S. Ct. 3062 (1983).

school tuition.⁵⁹ The Court applied the traditional tripartite test used to assess establishment clause claims and found that the statute advanced religion by financially rewarding parents for sending their children to parochial schools. Following this decision, other courts found similar constitutional violations when reviewing tax credit and tax deduction plans.

In June, 1983, a divided Supreme Court upheld a Minnesota tax deduction law, finding it "vitally different" from the New York statute.⁶⁰ First, the Court noted it was only one deduction among many in the tax law and that judicial deference must be given to legislative judgment regarding equalization of tax burdens. In the Court's view, however, the most important distinction was that the deduction was available for educational expenses incurred by all parents. The fact that a broad spectrum of parents benefited persuaded the majority to conclude that the law evidenced a secular purpose and did not have the primary effect of advancing religion.

From current political debates, it is clear that the Supreme Court's decision has provided the impetus for other states and the federal government to pursue the enactment of similar measures. Although the *Mueller* decision has provided encouragement for the Reagan Administration in its efforts to enact tuition tax credits at the federal level, it would appear that the present proposal directed solely at nonpublic school children would not differ significantly from the earlier New York plan which the Court distinguished from the Minnesota program. In assessing the Minnesota deduction, the court stated; "Most importantly, the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian private schools."⁶¹ Significant costs of including public school parents may deter modification of the federal proposal.

Transportation Aid

In 1947, the Supreme Court in *Everson v. Board of Education* established that public aid to transport nonpublic students does not violate the first amendment. Many related questions, however, were not answered by this decision and cases continue to arise. Two recent cases illustrate some of the continuing controversies.

The First Circuit Court of Appeals in 1983 upheld a Rhode Island statute providing bus transportation to nonpublic school children

59. Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

60. *Mueller v. Allen*, 103 S. Ct. 3062 (1983).

61. *Id.* at 3068.

beyond school district limits.⁶² The law divides the state into five regions and requires each local school district to provide a resident student, whether attending a public or private school, with bus transportation to the school or facility which the pupil attends as long as the school is within the region in which the pupil resides. While this appears neutral, in fact, public school pupils are required to attend school within their district of residence unless there is an approved exception because of a special program or curriculum. Although the Rhode Island law had a lengthy and intricate history of legislative efforts to provide transportation to sectarian students, the appellate court found that the law had a secular purpose, did not advance religion, or involve excessive governmental entanglement. The court did not find it significant that public school children were ineligible for busing beyond their school district lines, or that sectarian students were bused over special routes. The court did say the relative costs per student should remain "roughly proportional." Because of inadequate cost data, the court could not determine if the difference was excessive in this case. In an appeal to the Supreme Court in August, the district maintained that the cost is excessive. The Jamestown district purports to spend \$180 on public school students and \$847 on nonpublic students. The Supreme Court declined to review the case in October, 1983.

In West Virginia, Catholic parents brought an action to require the local school board to provide transportation to and from nonpublic schools for students. The board was providing monetary stipends and permitting students to ride buses on established routes. The West Virginia Supreme Court held that public and parochial students could be treated differently under a state law requiring transportation of all students. The local board had met its duty.⁶³

Textbooks

Another form of public financial support that continues to be challenged is aid for textbooks. The Eighth Circuit Court of appeals reviewed a South Dakota law requiring local school districts to loan textbooks and related workbooks to students in nonpublic schools and found the law facially neutral.⁶⁴ The Court, however, remanded the case because evidence was not sufficient to determine if district application involved the loan of materials proscribed by the Constitution.

62. *Members of Jamestown School Comm. v. Schmidt*, 699 F.2d 1 (1st Cir. 1983), *cert. denied*, 52 U.S.L.W. 3265 (Oct. 4, 1983).

63. *Janasiewicz v. Board of Educ. of Cty. of Kanawha*, 299 S.E.2d 34 (W. Va. 1982).

64. *Elbe v. Yankton Indep. School Dist.*, 714 F.2d 848 (8th Cir. 1983).

Although loan of textbooks does not violate the federal constitution, some states continue to find that it violates their state constitutions. In July the Kentucky Supreme Court ruled that the state constitution has "much more detailed and explicit proscription" than the first amendment.⁶⁵ Kentucky's constitutional provision for education specifies that "no portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian, or denominational school."⁶⁶ Additionally, the law specifies that "taxes shall be levied and collected for public purposes only."⁶⁷ The court found that "A fair reading of these several sections of the constitution compels the conclusion that money spent on education is to be spent exclusively in the public school system."⁶⁸

CONCLUSION

A common issue underlying school finance litigation at all levels of government is sufficiency or adequacy of revenue. Most often this debate focuses on the state's responsibility to provide for a free system of public schools. Other issues, however, also surface: local budget autonomy, state and federal program mandates, public aid to non-public schools, individual federal rights, and the federal government's responsibility. The resolution of these issues has significant implications for ensuring the funding of quality public education programs.

65. *Fannin v. Williams*, 655 S.W.2d 480, 483 (Ky. 1983).

66. *Id.* at 482.

67. *Id.*

68. *Id.*

Legal Issues in Asbestos Litigation

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Asbestos refers to a group of fibrous, incombustible, magnesium and calcium silicate minerals.¹ It is a valuable product with many uses, including heat and noise insulation and as a binder.² Asbestos has a tendency to separate into tiny fibers. If these fibers become airborne and are subsequently inhaled into human lungs, death or disablement may result.³

Asbestos is the only known cause of mesothelioma, a painful and fatal cancer of the lining of the lungs or stomach.⁴ Asbestos is also the cause of other disabilities, including asbestosis, a scarring of the lungs that progressively hinders breathing capabilities.⁵

At least one court has concluded that the asbestos manufacturing industry knew about the dangers of airborne asbestos fibers as early as the mid-1930s.⁶ Despite the danger, the industry was "silent with respect to the dangerous relationship between asbestos and cancer."⁷ Further, a convincing case can be made based on industry documents produced in litigation that certain industry officials actively sought to obscure information relating asbestos and fatal diseases.⁸

1. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 152 (25th ed. 1974).

2. U.S. Department of Justice, The Attorney General's Asbestos Liability Report to the Congress prepared pursuant to section 8(b) of the Asbestos School Hazard Detection and Control Act of 1980, i (August 1981).

3. *Id.* at i.

4. Reitze, Nicholson, Holdday & Selikoff, *Application of Sprayed Inorganic Fiber Containing Asbestos: Occupational Health Hazards*, 33 AM. INDUS. HYG. ASS'N J. 178 (1972).

5. *Id.* at 178. See also Commercial Union Insurance Companies, Environmental Task Force, Asbestos—A Social Problem 12-14 (May 12, 1981). The Task Force estimates that 67,000 cancers per annum of 17 percent of all cancers detected annually in the United States will be attributable to asbestos exposure.

6. *Supra* note 2 at i.

7. Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1355 (E.D. Tex. 1981).

8. *Supra* note 2 at 34. For further treatment of this subject, see ASBESTOS LITIGATION REP. (Feb. 7, 1979).

Spraying material containing more than one percent asbestos for fireproofing or insulation purposes was banned by the Environmental Protection Agency (EPA) in 1973.⁹ The EPA regulations were promulgated under the authority of the Clean Air Act to prevent asbestos fibers from contaminating outdoor ambient air. However, it later became apparent that these regulations were not sufficiently broad because they only banned use of asbestos as an insulation and fireproofing material but not for decorative purposes.¹⁰ As a result of this concern, in 1978 the EPA amended the regulations to ban asbestos spraying for any purpose.¹¹

Asbestos exposure poses a serious health threat to the general population. Inhaled asbestos fibers deposited in the lungs remain throughout the individual's lifetime. Subsequent exposure to asbestos adds to the body's burden of retained fibers.¹² Scientific evidence strongly supports the contention that children face a greater risk of developing asbestos-related cancer than adults. Mesothelioma generally occurs in the sixth or seventh decade of life, usually 20-40 years after the victim's initial exposure to asbestos. This long latency period combined with other factors such as cigarette smoking, children's faster metabolic rate and increased activity increase the risk of cancer for children exposed to asbestos.¹³

Asbestos was first used in the schools after World War II. From 1946 until the early 1970s when regulations began to be promulgated, tens of thousands of tons of asbestos products were used in American elementary and secondary schools and colleges.¹⁴ According to a recent estimate by the Service Employees International Union, there are probably 11,000 still uncleaned schools with unstable, fiber-shedding asbestos. These schools are attended by 3.24 million children and employ 650,000 adults.¹⁵

In response to concern for the health of school children and employees, Congress enacted the Asbestos School Hazard Detection and Control Act of 1980.¹⁶ In that act, federal funds were authorized to

9. 38 Fed. Reg. 8,826 (1973).

10. *Supra* note 2 at 51.

11. 43 Fed. Reg. 26,372 (1978). Although the spraying of asbestos-containing materials has been banned, the application of asbestos products by trowel has not. *See, supra* note 2 at iii.

12. *Oversight Hearings on Asbestos Health Hazards to School Children, Hearings on J.R. 1435 and H.R. 1524 Before the Subcommittee on Elementary, Secondary, and Vocational Education*, 86th Congress, 1st Sess. 298 (1979).

13. *Id.* at 298.

14. *Supra* note 2 at ii.

15. *Killer in the Classroom*, *The New York Times*, Nov. 13, 1983, 20-E, col. 1.

16. Pub. L. No. 96-270, 94 Stat. 487 (1980).

local educational agencies to conduct programs to find asbestos-containing materials in the schools and take remedial action to assure the safety of school children and employees. Federal regulations promulgated by the department of education set out procedures and criteria to make funds available.¹⁷ Under the regulations, grants would be available to assist eligible schools in identifying asbestos hazards. Interest-free loans would also be available to assist in the correction of those hazards.

However, as yet no funds have been made available. Under the provisions of the Toxic Substance Control Act (TSCA),¹⁸ the EPA has enacted regulations to address the problem of asbestos in schools.¹⁹ Recent EPA regulations require local education agencies (e.g., school districts) to inspect school buildings to identify asbestos materials. School officials must, under the regulations, sample and analyze the friable materials for asbestos. They are further required to notify parents and employees of ways to minimize exposure to asbestos and the potential hazards of exposure. The rule exempts certain schools from its requirements. Compliance by affected schools was required by May 27, 1983. However, the deadline proved ineffective. The EPA reports that approximately two-thirds of the affected schools failed to comply with the law.²⁰

Why are schools confronted with the asbestos hazard seemingly unresponsive to the law? One answer may be that many schools have found dangerous amounts of asbestos but cannot afford to do anything. Clean-up costs a typical school about \$100,000.²¹

One course of action open to school officials is to seek recovery against the individuals responsible for putting asbestos in the school in the first place. Potential defendants in such litigation include architects who selected asbestos materials for use in the school, general contractors and subcontractors who installed asbestos materials, distributors or suppliers of the materials, and manufacturers of asbestos-containing materials. In order to effectively sue for recovery against any of these parties, however, the school may have to abate the asbestos threat at its own expense and immediately sue to recover costs for those remedial actions.²²

17. 34 C.F.R. 230-31 (1981).

18. 15 U.S.C. §§ 2601-2609 (1976).

19. 47 Fed. Reg. 23,360 (1983).

20. *Killer in the Classroom*, *supra* note 15 at 20-E, col. 1. Only elementary and secondary schools are affected by the current laws. This presumably exempts colleges from inspection as well as funding.

21. *Id.* at 20-E, col. 1.

22. A. Anderson & L. Nido, *Responding to the Threat of Asbestos-Containing Materials in School Buildings*, 1 INQUIRY & ANALYSIS 2 (1982).

Equitable restitution is discussed at length in a recent report prepared for Congress by the United States Department of Justice (DOJ).²³ The DOJ report concludes that the most effective remedy for schools may be to institute a civil lawsuit against the manufacturers of asbestos materials found in the schools. The DOJ report states:

Restitution appears to be the most desirable remedy from the prospective plaintiff's standpoint, because it most fits the problem and also may offer the most appropriate and favorable treatment in terms of statutes of limitation. The school districts could allege that the manufacturers who supplied friable asbestos for use in classrooms *without warning* that asbestos fibers are dangerous, and *without testing* to determine the danger in an environmental as opposed to an occupation setting, have a *duty to abate* the resultant hazard and must compensate the party abating the hazard.²⁴

The DOJ Report relies primarily on *The Restatement of the Law of Restitution* and the Supreme Court interpreting the *Restatement* to support its conclusion. Under the "Public Emergency Assistance Doctrine" of the *Restatement*, a party is entitled to restitution for expenses if, e.g. it "removes an obstruction or makes repairs upon a public road which has become imminently dangerous for the traveling public, if the town or person whose duty it is to care for the road fails to do so."²⁵

The DOJ Report concludes that where friable asbestos materials present a situation that is imminently dangerous to the student public, a case for recovery may be made. It argues that asbestos manufacturers who created the condition should be found liable to schools that have abated the asbestos threat at their own expense, since the manufacturers themselves failed to make the necessary repairs.²⁶

The DOJ Report bases its application of the *Restatement* to asbestos on a Supreme Court case that dealt with an analogous situation. In *Wyandotte Transportation Co. v. United States*,²⁷ the U.S. Government removed a sunken barge containing lethal chlorine gas from the Mississippi River. The barge was considered a public hazard. The Court held that the government was entitled to "place the responsibility for removal upon those who negligently sank the vessel."²⁸ The Court relied on the provisions of the *Restatement*, emphasizing (1) that the immediate removal of the barge was essential, and (2) that the negligent owners of the barge refused to remove it.²⁹

23. *Supra* note 2 at 96.

24. *Id.* at 117.

25. *Id.* at 118.

26. *Id.* at 118.

27. 389 U.S. 191 (1967).

28. *Id.* at 204.

29. *Id.* at 205.

One of the most significant drawbacks to employing an equitable restitution theory to all asbestos cases is that it requires the school to fund the remedial program outright and depend on the uncertainties of litigation for reimbursement.³⁰ In many cases, a school may simply not be able to afford the risk of spending money up front that may never be recovered.

Traditional theories of negligence, strict liability and breach of warranty, have generally been more frequently employed than the equitable restitution theory. A New Jersey case, *Cinnaminson Township Board of Education v. National Gypsum Co.*,³¹ was based against manufacturers on strict tort liability, breach of express and implied warranties of fitness and merchantability and negligence. Attorneys for the case did not argue the equitable restitution theory because New Jersey, unlike most states, permits recovery of economic loss under tort law.³²

A similar suit in Texas, *Dayton Independent School District v. United States Gypsum Co.*,³³ relies principally on an argument under the state product liability law that asbestos-containing materials in schools were defective and inflicted property damage on school buildings. However, attorneys for the case included an equitable restitution argument in their brief.³⁴

One significant drawback to employing any theory of liability is the problem of determining which manufacturer was actually responsible for the installation of asbestos. Many schools, particularly older schools, may have lost records crucial to pinpointing the identity of manufacturers, distributors, or suppliers of friable asbestos in their schools. Many schools also face the complex problem of determining who is primarily liable where several manufacturers have supplied asbestos. In many cases it is impossible to determine one company's liability over another.³⁵

In *Borel v. Fibreboard Paper Products Corp.*,³⁶ the court acknowledged the difficulty in determining which manufacturer was actually responsible for the plaintiff's injury. The plaintiff stated for the record that he had developed mesothelioma and asbestosis during a long history of exposure to asbestos products. The plaintiff argued

30. *Supra* note 22 at 7. For a detailed discussion of establishing an asbestos case in court, see *supra* note 2 at 84.

31. No. 80-1842 (D.N.J. May 19, 1980).

32. *Asbestos Report Offers Creative Theories of Liability*, Legal Times of Washington, Nov. 16, 1981, at 1, col. 1.

33. No. B 81-0227-CA (E.D. Tex. April 22, 1981).

34. Legal Times of Washington, *supra* note 31 at 13, col. 4.

35. 493 F.2d 1076 (5th Cir. 1973).

36. *Id.* at 1076.

that asbestos was "unreasonably dangerous,"³⁷ suing general manufacturers of asbestos who, he claimed, were responsible for his medical condition. The plaintiff claimed that he was unaware of the dangers of asbestos exposure and was not warned of any dangers by the manufacturers who had a duty to warn. The jury verdict in favor of the plaintiff on strict liability theory was affirmed by the reviewing court.³⁸ The court in *Borel* decided that all involved manufacturers should be held "jointly and severally liable."³⁹

The *Borel* decision permits the injured plaintiff to recover in cases where no one manufacturer can be identified for liability. *Borel* also stands for the proposition that manufacturers knew or should have known of the dangers asbestos posed to workers.⁴⁰ As a result, some legal commentators have recommended that the doctrine of collateral estoppel be utilized to keep defendants from relitigating the issue of medical knowledge, because the defendants in the majority of cases have litigated the issue and lost.

Such an approach to the asbestos issue is clearly advantageous to schools seeking compensation to recover the costs of an asbestos cleanup. If *Borel* permits individuals to recover for asbestos-related injuries by suing all the manufacturers of asbestos generally, schools might also sue on an analogous theory, claiming that installation of asbestos was "unreasonably dangerous." This approach might be particularly helpful to those schools lacking a complete record indicating who is responsible for asbestos installation.

Another problem that schools must deal with is the special problem that statutes of limitation pose to the prospective plaintiff.

Under traditional rules of strict liability and negligence, the time allowed for bringing a suit begins to run at the time the plaintiff is exposed to the harmful substance. The problem with this approach when applied to latent diseases, like those caused by asbestos, is that it often leads to harsh results. Because it may take years for an asbestos-related disease to show up, the typical three or four years allowed for such a case to be brought may well be run before the plaintiff realizes he has been injured. As a result, the injured party has no recourse against manufacturers or other parties responsible for his medical condition.⁴¹

37. *Id.* at 1076.

38. *Id.* at 1081.

39. *Id.* at 1096.

40. *Id.* at 1096.

41. Comment, *The Asbestos Tragedy: Legal Issues and the Need for Reform*, 8 UNIV. DAYTON L. REV. 353, 358 (1983).

Some courts, responding to the harsh results of the traditional rule, have adopted the "discovery rule."⁴² Under the discovery rule, the plaintiff is permitted to recover even when the injury has taken a long time to develop. Once the plaintiff discovers the injury, or through reasonable care should have discovered it, the statutory period begins to run.

Other courts which might have adopted the "discovery rule" by judicial precedent have not because of their firm belief that any change from the tradition rule to the "discovery" type approach must be the result of legislative rather than judicial action.⁴³

When the Supreme Court of Virginia faced this particular issue in *Locke v. Johns-Manville Corp.*,⁴⁴ it applied an even different approach to the question. Under a statute of limitations that began to run when the plaintiff was injured, the court held that medical evidence determines when the injury occurred. According to this holding, medical evidence may pinpoint the date any time from an initial exposure to asbestos until the moment the asbestos-related disease is discovered.⁴⁵

The *Locke* decision has been attacked by critics as being essentially inequitable. Under this decision, two plaintiffs with similar diseases might be treated differently depending on the physical manifestations of asbestos-related disease. Critics also point to the fact that because of the broad interpretation of what constitutes an injury, the statute would probably begin to run at an early point in many asbestos cases, resulting in a denial of relief to plaintiffs.

As a statute benefitting schools who might wish to recover for asbestos containment, the discovery rule is most advantageous. Because schools did not discover the injurious character of asbestos in their schools until recently, the schools could argue that they had no knowledge or notice that an asbestos cleanup was necessary. Furthermore, the government has only recently enacted laws that take remedial action in schools where asbestos is found. This may constitute evidence that the general public has only recently discovered the general health

42. *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008 (1981). See also *Urie v. Thompson*, 337 U.S. 163 (1949) (silicosis); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982) (asbestosis); *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155 (8th Cir. 1975) (asbestosis); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973) (asbestosis and mesothelioma), cert. denied, 419 U.S. 869 (1974); *Louisville Trust Co. v. Johns-Manville Prods. Corp.*, 580 S.W.2d 497 (Ky. 1979) (mesothelioma); *Haig v. Johns-Manville Prods. Corp.*, 284 Md. 70, 394 A.2d 299 (1978) (mesothelioma).

43. Note, *Preserving Causes of Action in Latent Disease Cases: The Locke v. Johns-Manville Corp. Date-of-the-Injury Accrual Rule*, 68 VA. L. REV. 615 (1982).

44. 221 Va. 951 (1981).

45. Comment, *The Asbestos Tragedy: Legal Issues and the Need for Reform*, supra note 41 at 355.

threat posed by the presence of asbestos in their schools. Since the health threat has only recently been discovered, the statute of limitations should begin to run when the inspection for asbestos in the plaintiff school has been completed.

The latest and most controversial issue in asbestos litigation deals with the question of whether asbestos victims will ever get their day in court. On August 26, 1982, the Manville Corporation, the largest supplier of asbestos in the world, filed for bankruptcy under Chapter 11 of the Bankruptcy Act of 1978. At the time of the filing, Manville was, and still is, in sound financial health. As of June 30, 1982, its net worth exceeded \$1.1 billion, it was able to pay debts as they became due, and was in every other respect solvent. Nevertheless, Manville Corporation decided to seek the shelter of the newly revised bankruptcy law in order to avoid the high costs of compensating victims of asbestos-related disease.

Immediately upon filing its bankruptcy petition, Manville brought to a halt approximately 16,000 lawsuits pending against it. Section 362 of the Bankruptcy Code provides that a petition stays the commencement or continuation of the judicial proceedings against the debtor that was or could have been commenced before the commencement of a case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.⁴⁶

By filing under Chapter 11 of the Bankruptcy Act, Manville hopes to have all of its asbestos claims estimated and discharged pursuant to a bankruptcy plan and without a jury trial. The constitutionality of such a plan is questionable.

As complex as asbestos litigation may become, the claims of asbestos victims have usually been based on traditional theories of negligence, strict liability, and breach of warranty. Each claimant has an attendance right to trial by jury. The Manville bankruptcy petition is ultimately weighing the personal rights of injured asbestos victims against Manville's own property interest.

Moreover, the rights of future claimants are also at stake. Despite the obvious denial of due process to those having their claim adjudicated before they know it exists, the precedent of a scheme that discharges liability for future latent disease is staggering. Other asbestos manufacturers, drug manufacturers, and the makers of other agents capable of causing latent disease might follow suit, using the bankruptcy code as a shield.

Regardless of this injustice, Manville argues that future claimants constitute "contingent" claimants dischargeable under Chapter 11. Ordinarily, contingent claimants are guarantors or sureties. As such, they

46. 11 U.S.C. § 362.

have normally received consideration for the possible discharge of their claims. This is clearly not the case with the asbestos victim whose relationship with the bankrupt was not contractual but developed as a result of exposure to the bankrupt's toxic products.⁴⁷

In fact, one court called the concept of discharging in bankruptcy "contingent" products liability claims "absurd." In the case of *In re Gladding Corp.*,⁴⁸ the debtor Gladding manufactured recreational vehicles. In 1975 it sold one of these vehicles to Arthur and Joan Coomes. In 1977 Gladding sought Chapter 11 protection. In 1978 its plan was confirmed. In 1979 the Coomes discovered a defect in their vehicle and filed suit against Gladding. Gladding claimed that the suit had been discharged by the confirmation of the Chapter 11 plan.

The court ruled that the claim was not previously discharged, stating:

The claim in question is one the exercise of which was not known until August 29, 1979, when Arthur and Joan Coomes brought suit against CEF. The debtor's Chapter XI plan had been confirmed more than eight months previous. If the Court were to adopt the debtor's argument, every retailer and consumer who purchases an item from a manufacturer, would then be compelled to file in the bankruptcy a proof of claim for some as yet unknown and undetermined possibility of damage. Such a procedure would be absurd.⁴⁹

Asbestos litigation involves a complex consideration of traditional theories of negligence, strict liability and breach of warranty, as well as the law of equity and bankruptcy. Schools searching for relief from asbestos hazards should consider all theories of liability and all potential defenses in such suits. Plaintiff schools should also consider the effect of statutes of limitation in their particular jurisdictions, as well as the potential effect of the Mansville Bankruptcy on their prospective claims.

47. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858 (1982). The U.S. Supreme Court significantly limited the broad grant of jurisdiction awarded the bankruptcy courts under the 1978 act. Specifically, the Court held that it is unconstitutional for the bankruptcy courts to hear all civil proceedings "arising in or related to" cases filed under the bankruptcy laws. This is so because the judicial power of the United States to adjudicate "private rights" must be vested in Article III bankruptcy courts, by judges with life tenure and protection against salary diminution. Bankruptcy judges clearly do not enjoy such a position and therefore cannot exercise the wide general jurisdiction of the U.S. district courts.

For an in-depth discussion of the Manville bankruptcy petition and its potential effect on asbestos litigation, see J. Saginaw & B. Weinstein, *The Manville Bankruptcy: Will Asbestos Victims Get Their Day in Court?* TRIAL 76 (1983).

48. 20 B.R. 566 (D. Mass. 1982).

49. *Id.* at 568.

In any case, the school that starts a remedial program would probably be best advised to follow the department of education regulations. If a subsequent lawsuit is then unsuccessful, the school might still be eligible for interest-free loans if or when the Congress appropriates the money authorized by the 1980 Act.⁵⁰

50. *Responding to the Threat of Asbestos-Containing Materials in School Buildings*, *supra* note 22.

Seniority Rights and Title VII

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Seniority credit is increasingly important in the nation's work force. Unlike other criteria used to award job benefits, such as merit ratings, the primary feature of seniority systems "is that preferential treatment is dispensed on the basis of some measure of time served in employment."¹ The principle of seniority often is used to calculate fringe benefits such as vacation time and eligibility for insurance and retirement programs. More significantly, seniority frequently is used to establish priority lists for promotions, special training programs, and other job opportunities and to determine the order of personnel layoffs and recall privileges (competitive seniority). Seniority provisions are the focus of substantial attention at the bargaining table, and no aspect of collective bargaining agreements has a greater impact on the economic security of individual employees. The Supreme Court has recognized that "competitive status" seniority "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job."²

During the past two decades, seniority rights have been the source of a large volume of employment discrimination litigation. Victims of discriminatory hiring and promotion practices have sought seniority adjustments and have challenged the legality of neutral seniority

1. *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 606 (1980).

2. *Humphrey v. Moore*, 375 U.S. 335, 346-347 (1964). See B. Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1535 (1962).

systems that allegedly perpetuate the adverse effects of past discriminatory practices. Also, alterations in the application of seniority provisions to give preference to women and minorities have resulted in charges of "reverse discrimination." Suits have focused on the equal protection clause of the fourteenth amendment and Title VI and Title VII of the Civil Rights Act of 1964. Because of the breadth and complexity of the legal issues, this chapter is limited to an analysis of seniority rights under Title VII.

LEGAL CONTEXT

Title VII, as amended in 1972, bars discrimination in public and private employment on the basis of race, color, sex, national origin, and religion and covers hiring, promotion, compensation, fringe benefits, and other conditions of employment. Title VII claimants must meet certain procedural requirements in filing charges and must pursue appropriate state and federal administrative remedies before initiating a federal lawsuit.³ When judicial review is properly evoked, the federal court has two primary tasks. It must first determine whether Title VII's provisions have been violated, and if so, it must then fashion appropriate relief. Seniority rights have been at issue in both phases of Title VII litigation.

Two legal theories have been judicially developed for use in assessing Title VII claims. In suits alleging that an employee has received discriminatory *treatment*, the employer's unlawful motives must be proven. An employer can rebut an inference or *prima facie* case of disparate treatment by articulating a nondiscriminatory reason for the employment action. The plaintiff retains the burden of proving that the asserted nondiscriminatory reasons are mere pretexts to mask intentional discrimination. In contrast, where neutral practices are challenged as having a disparate *impact* on members of protected groups, proof of intentional discrimination is not required. After a *prima facie* case

3. For example, in states with state or local remedies for discriminatory employment practices, an individual cannot file charges with the Equal Employment Opportunity Commission (EEOC) until 60 days after state proceedings have been initiated, unless such proceedings have been earlier terminated. A claim must be filed with EEOC within 180 days of the alleged discriminatory act or within 300 days if the claim has been filed with a state or local agency. If the EEOC has not dismissed the charges, filed a civil action, or entered into a conciliation agreement within 180 days of the charge being filed, the individual must be given notice that within 90 days a civil action may be initiated. 42 U.S.C. § 2000e-5. The United States Supreme Court has ruled that the statutory time limitation for filing Title VII charges is not a jurisdictional prerequisite to a federal court action, but is subject to waiver, estoppel, and equitable tolling "to honor the remedial purpose of the legislation as a whole." *Zipes v. Trans World Airlines, Inc.*, 102 S. Ct. 1127, 1135 (1982).

of discriminatory impact is established, the burden shifts to the employer to prove that the contested practice is a legitimate business necessity.⁴

Title VI insulates seniority systems from disparate impact suits to the extent that employers are allowed to "apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system" as long as intentional discrimination is not involved.⁵ Substantial Title VII litigation has focused on what constitutes a bona fide seniority system and the scope of immunity provided to such systems under Title VII.

Once a Title VII violation is established, federal courts are empowered with broad authority to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."⁶ However, Title VII stipulates that nothing contained in the law "shall be interpreted to require any employer . . . to grant preferential treatment" based on race to remedy a de facto racial imbalance in the employer's work force.⁷ Sensitive questions have arisen over the nature of equitable relief (*e.g.*, retroactive seniority; hiring, promotion, and layoff quotas) necessary to compensate for prior discrimination. Under what circumstances must seniority adjustments be made and how much discretion do employers have in modifying the operation of seniority systems to give preference to women and/or minorities? Cases in which the judiciary has addressed these and related Title VII issues are analyzed in the following sections.

RETROACTIVE SENIORITY

Seniority rights often have become the focus of controversy after an employer has been found guilty of employment discrimination under Title VII. Plaintiffs, who have been victims of discriminatory hiring and promotion practices, have sought retroactive or constructive seniority to restore them to their proper place in relation to other employees.

In a significant 1976 decision, *Franks v. Bowman Transportation Company*, the Supreme Court held that minority plaintiffs who were denied employment because of race after the effective date of Title VII

4. For a discussion of these standards, see M. McCARTHY, DISCRIMINATION IN EMPLOYMENT: THE EVOLVING LAW (NOLPE Monograph 1983), at 3-7.

5. 42 U.S.C. § 2000e-2(h).

6. 42 U.S.C. § 2000e-5(g).

7. 42 U.S.C. § 2000e-2(j).

were entitled to priority hiring with retroactive seniority to the date of their rejected applications.⁸ The Court did not order the employer to modify its negotiated seniority system, but rather to award seniority that the plaintiffs should have earned to make them "whole." Without retroactive seniority for the unlawful refusal to hire, the majority reasoned that the plaintiffs could never obtain their rightful place in the seniority hierarchy. The burden was placed on the company to prove that individuals who reapplied for the jobs in question had not been victims of the discriminatory hiring practice. Despite the dissenting Justices' concern that "the economic benefits awarded discrimination victims would be derived not at the expense of the employer but at the expense of other workers,"⁹ the majority concluded that with respect to competitive status benefits, it is "presumptively necessary" for the burden of prior racial discrimination to be "divided among discriminatee and nondiscriminatee."¹⁰

In the latter 1960s and early 1970s several federal appellate courts awarded retroactive seniority to individuals where neutral seniority systems perpetuated discrimination even though the discriminatory practices occurred prior to the effective date of Title VII.¹¹ These courts reasoned that "Congress did not intend to freeze an entire

8. 424 U.S. 747 (1976). The majority reasoned that "if relief under Title VII can be denied merely because the majority group of employees who have not suffered discrimination will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed," *id.* at 775, *citing* *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir. 1971). *See also* *Freeze v. Aro, Inc.*, 503 F. Supp. 1045, 1048 (E.D. Tenn. 1980), in which the federal district court recognized that despite the conflict between the award of increased seniority rights to one employee and the economic interests of other employees, it is reasonable for persons "innocent of wrongdoing to bear some burden" to compensate for past discrimination.

9. *Id.*, 424 U.S. at 789 (Powell, J., dissenting). Chief Justice Burger would have preferred a monetary award (front pay) for discrimination victims rather than an award of retroactive seniority which disadvantages innocent employees instead of the employer, *id.* at 780-781 (Burger, C. J., concurring in part, dissenting in part).

10. *Id.* at 777. The majority reasoned that the relief ordered achieved an appropriate middle ground between the status quo and "complete relief" which would deprive non-discriminatees of seniority obtained because of illegal discrimination against minorities.

11. *See, e.g.,* *Nance v. Union Carbide Corp.*, 540 F.2d 718 (4th Cir. 1976), *cert. denied*, 431 U.S. 953 (1977); *Sabala v. Western Gilette, Inc.*, 516 F.2d 1251 (5th Cir. 1975), *vacated and remanded*, 431 U.S. 951 (1977); *Russell v. American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); *Rogers v. International Paper Co.*, 510 F.2d 1340 (8th Cir. 1975), *summarily vacated and remanded*, 423 U.S. 809 (1975); *Hairston v. McLean Trucking Co.*, 520 F.2d 226 (4th Cir. 1975); *Johnson v. Goodyear Tire and Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *United States v. Chesapeake and Ohio Railway Co.*, 471 F.2d 582 (4th Cir. 1972), *cert. denied sub nom.*, *Railroad Trainmen v. United States*, 411 U.S. 939 (1973); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971); *United Papermakers and Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *United States v. Sheet Metal Workers, Int.*, 416 F.2d 123 (8th Cir. 1969).

generation of Negro employees into discriminatory patterns that existed before the Act."¹² In 1974 the Fifth Circuit Court of Appeals declared that "[t]he principle of the illegality of a facially neutral seniority system superimposed on a history of employment discrimination is so well settled that extended discussion is unnecessary."¹³

However, in 1977 the Supreme Court ruled in *Teamsters v. United States* that a bona fide seniority system does not become unlawful simply because it operates to "freeze" the adverse impact of pre-Title VII discrimination.¹⁴ The Court reasoned that the seniority system at issue was negotiated and maintained free from any discriminatory intent, even though it perpetuated an advantage given to white employees who had accumulated greater seniority than minority employees who were victims of pre-Act discrimination in a particular job category. The majority concluded that "the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to passage of the Act."¹⁵

While barring relief for minority applicants who suffered only pre-Act discrimination, the majority agreed with the lower courts that victims of post-Act discrimination were entitled to seniority adjustments. Finding a discriminatory hiring pattern and practice in a specific job category, the Court reasoned that minorities who had applied for the jobs were presumptively entitled to be "made whole," unless the company could substantiate that its post-Act refusal to place a given minority applicant in such a position was not based on its discriminatory

12. *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 516 (E.D. Va. 1968).

13. *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1373 (5th Cir. 1974).

14. 431 U.S. 324, 350 (1977). In a separate opinion Justice Marshall cited over 30 federal appellate decisions supporting his conclusion that Congress did not intend to legalize seniority systems that perpetuate either pre- or post-Act discrimination. *Id.* at 378-379 (Marshall, J., concurring in part, dissenting in part).

15. *Id.* at 353. The same term the Supreme Court found no Title VII violation in an employer's failure to credit the petitioner with retroactive seniority to the date she was discharged under a discriminatory policy in 1968. The majority reasoned that the discharge was not challenged in a timely fashion, and that the petitioner had not been discriminated against in the calculation of seniority since she was rehired in 1972. In essence, the Court concluded that a "discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed." *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977). Also in 1977 the Supreme Court held that an employer was not obligated under Title VII to disregard a bona fide seniority system, contained in the collective bargaining agreement, to accommodate the religious practices of an employee: "The strong congressional policy against discrimination in employment argues against interpreting the statute to require the abrogation of the seniority rights of some employees in order to accommodate the religious needs of others." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79, n.12 (1977).

policy.¹⁶ The Court majority further reasoned that employees who had not submitted futile applications for the jobs in question were not barred from an award of retroactive seniority if they could carry the difficult burden of proving that they would have applied for the positions *but for* the company's discriminatory policies: "The denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination."¹⁷ However, the majority reasoned that such retroactive seniority could not be given to a date earlier than the Act's effective date.

The United States Supreme Court recently affirmed a decision in which the Second Circuit Court of Appeals ordered seniority adjustments for victims of an employment practice that locked in a discriminatory method of making hiring decisions (in contrast to locking in the effects of pre-Title VII discrimination).¹⁸ The appeals court recognized that under *Teamsters*, a meritorious Title VII claim against a municipality requires a discriminatory act after March 24, 1972,¹⁹ rather than a prior act whose effects are perpetuated through a facially neutral seniority system. The court found that after 1972 the City of New York conditioned employment eligibility on scores on tests which were not validated as job-related and had a disparate impact on blacks and hispanics. This practice was considered to be a continuing policy of discrimination which ended only when the last person was hired off the lists. The court reasoned that since the charge was timely filed within 300 days of the last discriminatory act, minority employees who had suffered from the discriminatory hiring practice since 1972 were entitled to back pay and retroactive seniority.²⁰

16. 431 U.S. at 356-376.

17. *Id.* at 367. See also *Association Against Discrimination in Employment v. City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 454 U.S. 897 (1981).

18. *Guardians Ass'n v. Civil Service Comm'n of the City of New York*, 633 F.2d 232 (2d Cir. 1980), *aff'd*, 103 S. Ct. 3221 (1983). This case also involved a request for relief under Title VI which prohibits discrimination against persons on the basis of race, color, or national origin in programs or activities receiving federal funds. The Supreme Court affirmed the appeals court's ruling that discriminatory intent is not essential to establish a Title VI violation but that a private plaintiff can recover only injunctive, noncompensatory relief for a defendant's unintentional violation of Title VI.

19. Before the 1972 amendments to Title VII, the Act did not apply to public employers.

20. In *Acha v. Beame*, 570 F.2d 57 (2d Cir. 1978), the Second Circuit Court of Appeals also ruled that in challenging a continuous discriminatory policy, the charge need only be made within the statutory limitation following the last occurrence of discrimination. *But see* *Bronze Shields, Inc. v. New Jersey Department of Civil Service*, 667 F.2d 1074 (3d Cir. 1981), in which the Third Circuit Court of Appeals ruled that the use of a hiring list compiled from the results of a discriminatory test given to job applicants did not constitute a continuing violation of Title VII. The Title VII claim was dismissed because the charge was not filed with EEOC within 180 days of the creation of the list.

However, employers can reduce their liability for hiring discrimination by offering a Title VII claimant the job previously sought, even though the offer does not include the promise of retroactive seniority. In 1982, the Supreme Court ruled in a six-to-three decision that a company's liability for hiring discrimination ended when it made an unconditional job offer to individuals who allegedly had been denied employment for discriminatory reasons.²¹ The Court majority concluded that such tolling of the accrual of back pay liability "serves the objectives of ending discrimination through voluntary compliance, for it gives an employer a strong incentive to hire the Title VII claimant."²² The Fourth Circuit Court of Appeals had found that the company's job offer without the promise of retroactive seniority was "incomplete and unacceptable," and thus did not curtail the accrual of liability.²³ But the Supreme Court majority held that the appellate court's position, which was championed by the Equal Employment Opportunity Commission (EEOC), discouraged employers from remedying discriminatory acts before being judicially required to do so, because hiring a Title VII claimant would be more costly than hiring other applicants for the same job. The majority noted that if claimants accept unconditional job offers while litigation is in progress, they still retain their right to receive full compensation, including retroactive seniority, if they prevail in their Title VII suits.

BONA FIDE STATUS

Because bona fide seniority systems that lock in the effects of pre-Title VII discrimination are not unlawful, an assessment of whether a given system is bona fide is crucial in determining whether seniority adjustments are required to compensate for the system's disparate impact. In 1977, the Fifth Circuit Court of Appeals summarized the criteria that should be used in determining whether a seniority system is bona fide: (1) it must be neutral in that transfers between seniority units affect all employees equally; (2) it must be rational in that it is designed in accordance with common practices in the industry; (3) its genesis must not be grounded in discrimination; and (4) it must not be maintained for an illegal purpose. The court noted that the four factors

21. *Ford Motor Co. v. Equal Employment Opportunity Comm'n*, 645 F.2d 183 (4th Cir. 1981), *rev'd and remanded*, 102 S. Ct. 3057 (1982).

22. *Id.*, 102 S. Ct. at 3064. Justice Blackmun admonished the majority for providing employers with a "unilateral device" to cut off back pay liability by making "cheap offers" that plaintiffs cannot reasonably be expected to accept. *Id.* at 3071, 3075 (Blackmun, J., dissenting).

23. 645 F.2d at 193.

are focal points for deciding "whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system" which is "integral to a determination that the system is or is not bona fide."²⁴ Based on evidence that the seniority system at issue was adopted when job segregation was standard operating procedure and was maintained in part to discourage black workers from transferring into specific bargaining units, the court found that the system was not bona fide. The court noted that black employees were forced to "commit seniority suicide" to enter departments from which they were previously excluded unlawfully because of race.

Two years earlier, however, the same court upheld a seniority system as bona fide under Title VII because the long-established system had been adopted without any intent to discriminate.²⁵ Noting that the employer's hiring practices had been nondiscriminatory for over ten years and that individual employees who were laid off under the system had not themselves been victims of prior employment discrimination, the court held that the use of seniority in determining layoffs was not unlawful despite more blacks than whites being discharged. The court endorsed the use of a "last-hired—first hired" policy for reducing personnel even if it resulted in the elimination of blacks from the company's work force. The Third Circuit Court of Appeals similarly found that a company's collective bargaining agreement, stipulating that personnel would be reduced on the basis of reverse seniority, did not unlawfully frustrate the objective of increasing the percentages of female and minority employees through affirmative action in hiring.²⁶ The court reasoned that in spite of the disparate impact of seniority-based layoffs on women and minorities, the practice was not subject to Title VII attack without evidence of discriminatory intent. In 1979 an Alabama federal district court also upheld a seniority system as bona fide because an assessment of the "totality of the circumstances" indicated that purposeful discrimination was not involved, even though the system did not satisfy one of the four criteria described previously.²⁷

In several Title VII cases, courts have been called on to determine whether specific employment practices are part of bona fide seniority

24. *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 350-352 (5th Cir. 1977). See also *Teamsters v. United States*, 431 U.S. 324, 355-356 (1977).

25. *Watkins v. United Steel Workers of America, Local No. 2369 v. Continental Can Co.*, 516 F.2d 41 (5th Cir. 1975).

26. *Jersey Central Power and Light Co. v. Local Unions of the Int'l Bhd. of Elec. Workers*, 508 F.2d 687 (3d Cir. 1975).

27. *Faulkner v. Republic Steel Co.*, 30 FEP Cases 555, 563 (N.D. Ala. 1979).

systems and thus immunized from disparate impact suits. The Ninth Circuit Court of Appeals found that an employer's criteria for distinguishing between temporary and permanent employees (a temporary employee must work at least 45 weeks in a single calendar year before becoming a permanent employee) was not part of a bona fide seniority system; therefore, plaintiffs could establish a Title VII violation by proving that the policy had a disparate impact on minorities.²⁸ The appeals court found the rule to be a classification device for determining who attains permanent status, noting its susceptibility to discriminatory application because disfavored employees could repeatedly be laid off prior to attaining 45 weeks of service in a year. However, in 1980 the Supreme Court reversed the decision, concluding that the 45-week requirement, which focuses on length of employment and establishes a threshold standard for entry into the permanent employee seniority track, is a component of a seniority system within the meaning of Title VII.²⁹ The case was remanded to give the plaintiffs an opportunity to establish that the seniority system is not bona fide in that it is grounded in intentional discrimination.

More recently, the Supreme Court ruled in *American Tobacco Company v. Patterson* that several lines of progression for job advancement with a disparate impact on women and minorities constituted a bona fide seniority system that was not vulnerable to being invalidated under Title VII without evidence of discriminatory intent.³⁰ The Fourth Circuit Court of Appeals had reasoned that even if the job progression lines were part of a seniority system, the practice was subject to a disparate impact suit because of its post-Act adoption.³¹ Applying this logic, the appeals court had found a Title VII violation because the use of the progression lines was not justified as a business necessity. Disagreeing, the five member Supreme Court majority concluded that proof of discriminatory intent is necessary to invalidate either pre- or post-Title VII seniority systems. The majority noted that if post-Act seniority systems were subjected to disparate impact suits, employers would be discouraged from modifying their pre-Act systems to make them more equitable.

Three of the dissenting justices in *American Tobacco* argued that Title VII's exemption for bona fide seniority systems was intended to cover only those in operation prior to the effective date of the law because Congress referred to the "application" rather than "adoption"

28. *California Brewers Ass'n v. Bryant*, 585 F.2d 421 (9th Cir. 1978), *vacated and remanded*, 444 U.S. 598 (1980).

29. *Id.*, 444 U.S. at 609.

30. 634 F.2d 744 (4th Cir. 1980), *vacated and remanded*, 102 S. Ct. 1534 (1982).

31. *Id.*, 634 F.2d at 749.

of such systems.³² Justice Stevens, in a separate dissent, argued that post-Act seniority systems should be subject to the same antidiscrimination standards that apply to hiring, promotion, discharge, and compensation practices, reasoning that such systems cannot be considered bona fide if they have a disparate impact and are not justified by a legitimate business purpose.³³ But the majority was not persuaded that Title VII's immunity from disparate impact suits applies only to seniority systems adopted before the effective date of the Act.

In another 1982 decision, *Pullman-Standard v. Swint*, the Supreme Court admonished the Fifth Circuit Court of Appeals for substituting its judgment for that of the trial court in determining whether a seniority system was bona fide.³⁴ The trial court had found no discriminatory intent in connection with the challenged seniority system, but the appellate court reasoned that the contested system was grounded in intentional racial discrimination, precluding Title VII immunity as a bona fide seniority system. Vacating this decision, the Supreme Court noted that a finding of intentional discrimination is subject to the "clearly erroneous" standard of civil procedure (Rule 52).³⁵ The majority held that the appellate court's assessment of intentional discrimination based on the evidence was a finding of fact to be made by the trial court and not a question of law or mixed question of fact and law permitting independent assessment by the appeals court.

Justice Marshall, dissenting, asserted that the appellate court's action was consistent with the clearly erroneous standard, noting that the court declared its "definite and firm conviction that a mistake has been made."³⁶ Moreover, he reasoned that while appeals courts have been especially reluctant to resolve factual issues which depend on the credibility of the testimony of witnesses, such deference is not required where the lower court's findings of fact are entirely based on documentary evidence. He contended that the appeals court followed well established legal principles in concluding that it was "crystal clear that considerations of race permeated the negotiation and the adoption of the seniority system in 1941 and subsequent negotiations thereafter."³⁷ However, the Court majority was not convinced that the appeals court applied proper standards of appellate review.

32. *Id.*, 102 S. Ct. at 1543 (Brennan, J., dissenting). Justices Marshall and Blackmun joined in the dissent.

33. *Id.* at 1547-1549 (Stevens, J., dissenting).

34. 624 F.2d 525 (5th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 1781 (1982). See also *Terrell v. United States Pipe & Foundry Co.*, 30 FEP Cases 1515 (5th Cir. 1983).

35. FED. R. CIV. P. 52.

36. 102 S. Ct. at 1793 (Marshall, J., dissenting), quoting 624 F.2d at 533.

37. *Id.* at 1798, quoting 624 F.2d at 532.

Although courts seem increasingly inclined to give deference to negotiated collective bargaining agreements in concluding that challenged seniority systems are bona fide, it is not impossible for plaintiffs to establish that the operation of a seniority system violates Title VII. For example, in 1982 the Seventh Circuit Court of Appeals found that a union negotiated and maintained a seniority system with the intent and effect of having a disparate impact on black workers.³⁸ The bargained seniority system made it difficult for minorities to transfer into a specific bargaining unit and to obtain certain jobs. Evidence indicated that whites transferred into positions within the unit with full carry-over seniority, while blacks were discouraged from doing so. Based on its finding of discriminatory intent, the appeals court ruled that the seniority system could not be considered bona fide under Title VII.

AFFIRMATIVE ACTION PLANS

The adverse impact of seniority systems on victims of prior discriminatory employment practices has not been the only source of controversy. Title VII claims also have arisen in a number of cases involving modifications in seniority systems to give preference to women and minorities in eligibility for promotion and other job benefits or in protection from layoffs. Such affirmative action plans, similar to awards of retroactive seniority, have an impact on the competitive status of employees. However, in contrast to seniority adjustments for individual discrimination victims, class preferential treatment benefits certain class members who have not personally suffered discrimination. In some instances affirmative action plans have been developed because of a judicial finding of prior intentional discrimination in hiring and other personnel practices. In other situations employers have voluntarily entered into collective bargaining agreements that call for preferential treatment to compensate for past discriminatory acts, even though the prior acts have not resulted in legal liability. Such preferential treatment has been challenged as impairing vested seniority rights of other employees.

In a significant 1979 case, *United Steelworkers of America v. Weber*, the Supreme Court held that a company's preferential treatment of minorities did not abridge Title VII even though it modified the use of seniority in awarding job opportunities. The Kaiser Aluminum and Chemical Corporation had entered into a collective bargaining agreement with the union which included an affirmative action plan

38. *Wattleton v. International Bhd. of Boilermakers*, 686 F.2d 586 (7th Cir. 1982).

stipulating that half of the opening in plant craft training programs would be reserved for black employees until the percentage of black craft workers in the plant approximated the percentage of blacks in the local labor market.³⁹ The federal district court held that the affirmative action plan violated Title VII, and the Seventh Circuit Court of Appeals affirmed, reasoning that all employment preferences based upon race (including those preferences incidental to bona fide affirmative action plans) violate Title VII's prohibition against racial discrimination in employment. Disagreeing, the Supreme Court held that Title VII's prohibition against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans to correct a racial imbalance in traditionally segregated jobs. Although Title VII stipulates that nothing contained in the law shall be interpreted to "require" employers to grant preferential treatment based on race to remedy a de facto racial imbalance among employees, the Court concluded that if Congress had intended to *prohibit* all race-conscious affirmative action, it would have substituted the phrase "require or permit" for the word "require."⁴⁰

While not defining precisely the line of demarcation between permissible and impermissible affirmative action plans, the Court ruled that the challenged Kaiser plan was on the permissible side of the line. The purposes of the plan mirrored those of the statute and did not unnecessarily "trammel" the interests of white employees. It neither required the discharge of white workers and their replacement with new black hires, nor created an absolute bar to the advancement of white employees because half of those trained in the program would be white. Moreover, the plan was a temporary measure, not intended to maintain a specific racial balance, but simply to eliminate a manifest racial imbalance.

Subsequently, the Supreme Court declined to review a decision in which the Sixth Circuit Court of Appeals upheld a voluntary affirmative action plan for the Detroit Police Force which allowed black officers to receive promotions to sergeant over white officers with higher numerical standings on the eligibility list.⁴¹ The appeals court concluded

39. 443 U.S. 193 (1979). The previous year the Supreme Court delivered its widely publicized decision invalidating the use of a rigid quota system to guarantee a specific number of minorities in each entering medical school class at the University of California-Davis. The Court found that the separate admissions system for minorities violated Title VI of the Civil Rights Act of 1964 (which bars the exclusion of a person on the basis of race from a program or activity receiving federal funds) because nonminorities were not eligible for the "reserved" slots regardless of their qualifications. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

40. *Id.*, 443 U.S. at 207. See also *Valentine v. Smith*, 654 F.2d 503 (8th Cir. 1981).

41. *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

that the evidence substantiated prior racial discrimination by the police department which justified the preferential treatment of minorities. The court noted that patterns of discrimination which might not result in legal liability can nonetheless justify a race-conscious remedial plan under Title VII. The court further held that the city was not required to prove that the persons receiving preferential treatment under the affirmative action plan had been individually subjected to discrimination. The court declared:

[A] case involving a claim of discrimination against members of the white majority is not a simple mirror image of a case involving claims of discrimination against minorities. When claims are brought by members of a group formerly subjected to discrimination the case moves with the grain of the Constitution and national policy. A suit which seeks to prevent public action designed to alleviate the effects of past discrimination moves against the grain. . . .⁴²

Until recently, affirmative action plans usually were confined to hiring and promotion quotas, but provisions addressing personnel layoffs have become increasingly common. Plans that disregard seniority rights to *preserve* a designated percentage of women and/or minority employees are particularly troublesome because such preferential treatment can result in other employees losing their jobs. Many cases pertaining to preferential layoffs in school districts have focused on desegregation decrees that include employment goals and quotas to remedy constitutional and statutory violations of students' rights. Rights guaranteed by the equal protection clause and Title VI have often been at issue in these cases.⁴³ However, some challenges to the use

42. *Id.*, 608 F.2d at 697. While concluding that the affirmative action plan did not violate Title VI or Title VII, the case was remanded for additional consideration of the constitutional issues. The appeals court identified several criteria for the lower court to use in assessing the constitutionality of the plan including operational need for the plan, evidence of prior discrimination leading to the current racial imbalance, and lack of alternative means to correct the imbalance in the foreseeable future.

43. For example, the First Circuit Court of Appeals upheld an affirmative action plan as part of a desegregation order in the Boston School District. The court reasoned that without the plan, stipulating that minorities must maintain 20 percent of the teaching positions regardless of their seniority, efforts made in remedying intentional discrimination in the school district would be eradicated through layoffs necessitated by declining enrollments. *Morgan v. O'Bryant*, 671 F.2d 23 (1st Cir. 1982), *cert. denied sub nom. Boston Ass'n of School Adm'rs and Supervisors v. Morgan*, 103 S. Ct. 62 (1982). In contrast, the Sixth Circuit Court of Appeals recently reached an opposite conclusion, reversing a district court's order which imposed a racial quota on the Kalamazoo School District's teaching staff, thereby abrogating seniority and contractual rights of non-minorities. The appeals court held that the district court erred by imposing a quota of

of quotas in reduction in force policies have focused in part on Title VII claims, and courts have rendered conflicting rulings regarding the Title VII rights at stake.

For example, in 1982 a Michigan federal district court rejected federal constitutional and federal and state statutory challenges to a school district's affirmative action plan designed to maintain a faculty racial composition roughly approximating that of the student body.⁴⁴ Although the Title VII charge was dismissed for jurisdictional reasons (because the plaintiffs had not obtained a notice of right-to-sue from EEOC), the court noted that Title VII does not require a judicial finding of intentional discrimination before an employer can institute an affirmative action plan. The court concluded that the historical "chronic and substantial" underrepresentation of black teachers in the district justified the temporary imposition of racial quotas in reducing personnel. The court further reasoned that it was appropriate to compare the percentage of minority teachers to the percentage of minority students in the district rather than to relevant labor force data because minority teachers provide important role models for minority pupils.

The following year, however, a Pennsylvania federal district court relied on Title VII in striking down a school district's use of racial quotas to maintain, not merely achieve, racially balanced school faculties.⁴⁵ The court reasoned that racial quotas may be necessary under certain circumstances to *attain* racially balanced staffs, but permanent quotas to *preserve* existing racial percentages constitute discrimination under Title VII. The court distinguished the imposition of a quota to remedy a racial imbalance, such as the plan upheld in *Weber*, from a quota used to maintain a specific racial composition. In the latter instances, the court held that nondiscriminatory alternatives must be pursued.

Several years earlier a California federal district court found that the San Francisco School Board's resolution, requiring the attainment of a specified percentage of minority administrators, meant that virtually

minority teachers (20%) that must be maintained, reasoning that "the record does not demonstrate that nullification of the seniority and tenure rights of white teachers is necessary to vindicate the students' constitutional rights." *Oliver v. Kalamazoo Bd. of Educ.*, 706 F.2d 757, 764 (6th Cir. 1983). In May, 1983, the Boston Teachers Union petitioned the Supreme Court a second time to strike down the Boston School District's racially-based layoff system because of the similarity between the Kalamazoo and Boston cases, *Education Daily*, May 25, 1983, at 5. For a discussion of constitutional and Title VI issues involved in controversies over preferential treatment provisions, see Monique Clague's chapter in this book.

44. *Wygant v. Jackson Bd. of Educ.*, 546 F. Supp. 1195 (E.D. Mich. 1982).

45. *Knomnick v. School Dist. of Philadelphia*, 555 F. Supp. 249 (E.D. Pa. 1983). See also *Bacica v. Board of Educ. of the School Dist. of the City of Erie*, 451 F. Supp. 882 (W.D. Pa. 1978).

all administrative layoffs would be nonminorities and appointments would be minorities.⁴⁶ The court concluded that the resolution was not justified because there was no evidence of past discrimination in hiring administrators; indeed, several steps had been taken to increase the number of minority administrators. The resolution which foreclosed employment to nonminorities was found in violation of Title VII and the equal protection clause. In subsequent cases, however, the Ninth Circuit Court of Appeals has ruled that a finding of unconstitutional discrimination is not required before employers can impose quotas to protect minorities from layoffs. In 1981 the appeals court held that Title VII does not bar negotiated affirmative action plans that disregard seniority rights, reasoning that "seniority is merely an economic right which the unions may elect to bargain away."⁴⁷

Mixed messages have been even emanated from a single court. For example, in 1976 the Second Circuit Court of Appeals struck down the use of racial quotas in the New York City School District's personnel reduction policy.⁴⁸ The lower court had ordered the school district to maintain designated percentages of black and Puerto Rican supervisory personnel, resulting in whites with greater seniority being released. Reversing the order, the appeals court held that "the non-remedial distortion of a seniority system through preferential treatment based solely upon race is a form of reverse discrimination specifically prescribed" by Title VII.⁴⁹ The court found that a facially neutral excessing plan, operating on the concept of "last hired — first fired," would not unlawfully discriminate against minorities who are disproportionately affected. The court contrasted the permissible use of quotas in hiring practices to remedy past discrimination from the impermissible use of quotas in excessing practices that disregard a neutrally applied seniority system. The court reasoned that while the imposition of layoff quotas abridges Title VII, constructive seniority for specific employees may be an appropriate award with evidence that the individuals have been victims of hiring discrimination.

In 1983, however, the same court ruled that Title VII's immunity for seniority systems that are established and maintained without discriminatory intent does not preclude the federal judiciary from ordering modifications in the application of seniority rights to

46. *Anderson v. San Francisco Unified School Dist.*, 357 F. Supp. 248 (N.C. Cal. 1972).

47. *Tangren v. Wackenhut Services*, 658 F.2d 705, 707 (9th Cir. 1981). See also *Zaslowsky v. Board of Educ. of Los Angeles*, 610 F.2d 661 (9th Cir. 1979).

48. *Chance v. Board of Examiners and Bd. of Educ. of the City of New York*, 534 F.2d 993 (2d Cir. 1976), cert. denied, 431 U.S. 965 (1977).

49. *Id.*, 534 F.2d at 998. See also *Jersey Central Power and Light Co. v. Local Unions of the Int'l Bhd. of Elec. Workers*, 508 F.2d 687 (3d Cir. 1975).

correct constitutional violations.⁵⁰ The court held that such relief is necessary to remedy unconstitutional discrimination such as maintenance of a segregated school system. The appeals court concluded that the district court had not abused its discretion in imposing hiring and layoff quotas in the Buffalo School District to guarantee that the existing ratio of minority to majority teachers would be maintained. But the part of the lower court's order calling for racial quotas in recalling excessed teachers was reversed.

In a recent case the First Circuit Court of Appeals declared that remedial efforts to overcome the effects of past discrimination need not be color-blind and neither *Teamsters* nor *American Tobacco* preclude a court "in a litigated discrimination case to ensure that relief already ordered [is] not . . . eviscerated by seniority-based layoffs. To hold a seniority system inviolate in such circumstances would make a mockery of the equitable relief already granted."⁵¹ Accordingly, the court held that the Title VII entitlement to relief for prior discriminatory practices prevails over the Massachusetts civil service law requiring layoffs in reverse seniority order. The appeals court reasoned that under the court order, prohibiting the Boston Police and Fire Departments from reducing the current level of minority representation, staff reductions were intended to operate within the seniority law, with modifications "to the extent necessary to preserve the integration already achieved."⁵² Recognizing the significant difference between hiring and promotion quotas and a racial ratio insulating minorities from layoffs (because in the latter situations nonminorities with greater seniority lose their jobs), the court nonetheless endorsed the preferential staff reduction plan. The court concluded that an award of retroactive seniority to individual minority employees would *not* be an appropriate remedy because the racial imbalance of the department rather than individual relief was at issue. Finding the court-ordered percentage of minorities that must be maintained in the department to be "reasonable," the court noted that it was justified by a "compelling need" for racially balanced fire and police departments in a large metropolitan city with a minority population more than double the quota imposed. The court held that "there is nothing magical about seniority, and here common sense suggests that it should be tempered by other entirely rational

50. *Arthur v. Nyquist*, 712 F.2d 816 (2d Cir. 1983).

51. *Boston chapter, NAACP v. Beecher*, 679 F.2d 965, 974-975 (1st Cir. 1982), *vacated and remanded*, 103 S. Ct. 2076 (1983) (per curiam). See also *Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981) in which the appellate court upheld a consent decree preventing the city of Toledo from laying off minority fire fighters. The court noted that "while a bona fide seniority system may not itself violate the law, such a system cannot be allowed to obstruct remedies designed to overcome past discrimination." *Id.* at 564.

52. 679 F.2d at 975.

considerations so that the racial equity achieved at considerable effort in the past decade not be erased."⁵³ The court further declared:

To a minority police officer or fire fighter hired within the last ten years, the imposition of a rigid last hired, first fired seniority system would only mean that once again the dominant white culture had protected its own kind at the expense of blacks and hispanics. If the evil of racial discrimination is to be fought openly, we must not allow ourselves to be caught in a semantic web of aphorisms such as "reverse discrimination" that in the final analysis serve only to perpetuate the discrimination of the past.⁵⁴

The United States Supreme Court agreed to review this case, and the Justice Department submitted a friend-of-the-court brief on behalf of the nonminority plaintiffs, arguing that a seniority system cannot be overturned to protect minorities who were hired under an affirmative action decree. The brief asserted that "there is indeed something very important, if not 'magical', about seniority systems . . . and the rights they grant to employees."⁵⁵ However, in May 1983 the Supreme Court side-stepped the merits of this case, vacating the appellate court's decision and remanding the case for additional consideration because the circumstances surrounding the controversy had changed. In its per curiam order, the Supreme Court noted that Massachusetts had recently enacted legislation providing the city of Boston with new revenues, requiring reinstatement of all police and firefighters laid off during the reductions in force, protecting these persons from future layoffs for fiscal reasons, and requiring minimum staffing levels in the departments through June 30, 1983.⁵⁶

Thus, the Title VII rights at stake when seniority provisions are nullified by court-ordered hiring and layoff quotas remain unclear. Some courts have recognized that the imposition of racial quotas which abrogate seniority rights should be strictly scrutinized and upheld only if "necessary" (not merely reasonable) to cure constitutional violations and if the reverse discriminatory effects are not experienced by a small number of "readily identifiable individuals."⁵⁷ Although to date the Supreme Court has declined to address charges of reverse discrimination

53. *Id.* at 978. See also *Association Against Discrimination in Employment v. City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 454 U.S. 897 (1981); *Freeze v. Aro, Inc.*, 503 F. Supp. 1045 (E.D. Pa. 1980).

54. *Id.*, 679 F.2d at 978.

55. *Education Daily*, December 21, 1982 at 2.

56. 103 S. Ct. 2076 (1983).

57. See *Oliver v. Kalamazoo Bd. of Educ.*, 706 F.2d 757, 763 (6th Cir. 1983); *Morgan v. O'Bryant*, 671 F.2d 23, 28 (2d Cir. 1982); *Kirkland v. New York State Dep't of Correctional Services*, 520 F.2d 420, 429 (2d Cir. 1975).

in connection with remedial layoff quotas, it seems likely that such claims will increase until the high court clarifies the applicable legal principles.

A controversy involving the implementation and modification of a consent decree embodying an affirmative action plan for Memphis, Tennessee firefighters may provide the vehicle for such clarification because the Supreme Court recently agreed to review the case.⁵⁸ The Sixth Circuit Court of Appeals found that the "reasonable" consent decree endorsed by the federal district court furthers the legitimate interest of assuring equal employment opportunities by imposing hiring and promotion racial quotas. Nonminority firefighters petitioned to intervene, alleging that the decree results in reverse discrimination and that other alternatives are available to remedy past discrimination against minorities without shifting discrimination to nonminorities. The appeals court held that the district court did not abuse its discretion in ruling that the motion to intervene was untimely, noting that the nonminority petitioners had ample opportunities to air their objections to the consent decree before it was adopted.⁵⁹ The appeals court further held that the district court acted appropriately in modifying the decree after an unanticipated deficit in the city's projected budget prompted proposed layoffs. Reasoning that the lower court has "an affirmative duty to protect the integrity of its decree" by "not allowing unexpected events to eradicate the progress made pursuant to an affirmative action plan,"⁶⁰ the appeals court ruled that the trial court acted within its equity jurisdiction in overriding the union's seniority provision and enjoining the city from reducing the percentage of minorities in certain job categories. The appeals court found that the implementation and modification of the consent decree did not compromise any "legally protected interest" of nonminorities, rejecting the reverse discrimination charges as "impermissible collateral attacks."⁶¹ The court further noted that nonminorities had benefited from practices that brought on the consent decree. Substantial attention is focused on this case in hopes that the Supreme Court will clarify the legality of affirmative action plans that alter the operation of bona fide seniority systems.

58. *Stotts v. Memphis Fire Dep't*, 679 F.2d 541 (6th Cir. 1982), *cert. granted*, 103 S. Ct. 2451 (1983).

59. *Id.* at 549. See *Stotts v. Memphis Fire Dep't*, 679 F.2d 579 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 297 (1983).

60. 679 F.2d at 557, 560. Recognizing the sensitive nature of racial ratios, the court noted that there should be a relationship between the magnitude of the imbalance and the "strength of the goals." The court reasoned that racial ratios are "particularly appropriate where the racial imbalance is highly disproportionate." *Id.* at 553.

61. *Id.* at 558.

CONCLUSION

Title VII litigation involving seniority rights seems destined to continue with the legal issues becoming increasingly complex. While the federal judiciary has ordered the award of retroactive seniority to victims of post-Title VII discrimination in hiring and promotion practices, such relief has been triggered by discriminatory acts apart from the adoption or application of a seniority system. For example, seniority adjustments have been awarded to victims of the post-Act practice of conditioning employment eligibility on the results of a test that has not been validated as job-related.

Plaintiffs have not been as successful in claims that the operation of a seniority system per se violates Title VII because of its disparate impact on minorities or women. The Supreme Court has rendered several recent decisions making it more difficult to individuals to challenge the adverse effects of neutrally applied seniority systems. Both pre- and post-Title VII seniority systems that are established and maintained without unlawful motives have been upheld, even though the systems perpetuate the effects of prior discrimination. In short, Title VII's immunity for "bona fide" seniority systems immunizes *all* systems from disparate impact suits because lawful intent has been interpreted as the essence of bona fide status.

More controversial than claims of discrimination in the application of seniority provisions are claims of "reverse discrimination" in connection with modifications in seniority systems to give preference to minorities and/or women, particularly in connection with staff reduction practices. Sensitive questions have been raised regarding the extent that class preferential treatment is *required* to compensate for past intentional discrimination and the extent that it is *allowed* to correct a racial or gender imbalance in the absence of prior unconstitutional acts. Is such class preferential treatment justified because individual relief for discrimination victims (*e.g.*, retroactive seniority, back pay) is not sufficient to eradicate traditional patterns of employment discrimination? Is it appropriate for white males to suffer some present disadvantages (even though they personally are not guilty of discriminatory practices) because members of their class have enjoyed past advantages accruing from the discriminatory treatment of women and minorities? What constitutes a "compelling need" to justify protecting women and minorities from layoffs?

Courts have not answered these questions in unison. In several cases, courts have concluded that temporary hiring, promotion and layoff quotas are required to compensate for prior class discrimination although the individuals benefited may not have suffered discrimination

themselves. Even in some situations where no legal liability exists, some courts have reasoned that Title VII allows employers to negotiate affirmative action plans that modify seniority systems to protect women and/or minorities if there is evidence of a sufficient statistical disparity in the composition of the work force.⁶² However, other courts have reasoned that Title VII allows such preferential treatment only to attain, but not to maintain, a racial or gender balance. Until the United States Supreme Court clarifies the legal status of court-ordered and voluntary affirmative action plans that alter the operation of bona fide seniority systems, it seems likely that individuals displaced in the seniority hierarchy by such plans will continue to assert that they have Title VII rights at stake.

62. See *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979); *Detroit Police Officers v. Young*, 608 F.2d 671, 694-698 (6th Cir. 1979).

Beyond the Title VII Framework: Racial Quotas and Teacher Employment Policies in School Desegregation Litigation

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THE LEGAL CONTEXT

The focus of this chapter is on school desegregation litigation and attendant employment-related remedies decreed or rejected by the federal courts. The structure of desegregation suits differs from the structure of employment discrimination suits. The overarching remedial theory governing relief in school desegregation cases also differs from the general remedial theory governing employment discrimination cases.

In employment discrimination cases brought under the fourteenth amendment,¹ and/or Title VII² and Title VI³ of the Civil Rights Act of

1. "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws."

2. 42 U.S.C. § 2000e. For an analysis of the status of seniority systems under Title VII, see Martha McCarthy's chapter in this book.

3. 42 U.S.C. § 2000d provides: "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Unlike Title VII (42 U.S.C. § 2000d-3), the country's premier employment discrimination statute, Title VI is not primarily an employment discrimination statute. What is

1964, or other statutes, plaintiffs (or a government agency suing on their behalf) seek remedies for themselves as potential, present, laid off, or discharged employees, under one of several equal employment opportunity theories.⁴

In school desegregation cases, premised primarily on the equal protection clause of the fourteenth amendment, and to a lesser extent on Title VI, and the Equal Opportunity Act of 1974,⁵ The plaintiffs are minority public school children and their parents, not teachers. Minority teachers may or may not have been victims of employment discrimination. If courts should find segregated faculties within individual schools, or discrimination in the hiring of minority teachers, these factors are considered among the "important indicia of a segregated system."⁶ But employment-related remedies are not designed—even in cases in which some kind of discriminatory employment policy has been identified—to make the teachers whole. Race-conscious, faculty related remedies, with or without minority preferences, are devised to vindicate the constitutional rights of minority school children. The legal theory justifying them is equal educational opportunity, never equal employment opportunity.

This chapter attempts to analyze judicial responses to three kinds of faculty employment policies that have been components of decrees designed to achieve a "unitary" school system: teacher assignment, hiring and layoff policies. The decision to address them in this sequence reflects at least two considerations. First, it reflects, in good measure, an historic development. Judicial attention turned first to assignment

more, unlike Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, prohibiting gender discrimination in education programs, Title VI contains a provision specifically excluding employment from administrative action "except where a primary objective of Federal financial assistance is to provide employment." In spite of the fact that most teacher salaries are not primarily federally funded, it has been held, in the elementary/secondary school context, that Title VI administrative enforcement procedures do apply to teacher hiring and assignment, notwithstanding 2000d-3, when the objective of administrative action vis-a-vis teacher employment is to alleviate discrimination against students, who are the direct beneficiaries of federal financial assistance. See, e.g., *Caulfield v. Board of Educ. of City of New York*, 632 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 1030 (1981).

4. For an excellent discussion of competing equal employment opportunity theories see, G. R. LaNoue, *Equal Employment Opportunity: Three Conflicting Theories* (Unpublished paper prepared for the 1980 Annual Meeting of the American Society for Public Administration). LaNoue refers to them as theories of fair competition, proportional representation, and protected class reparations.

5. 20 U.S.C. § 1701. The Equal Educational Opportunity Act was enacted as part of the Educational Amendments of 1974. Section 1703d provides that "discrimination by an educational agency on the basis of race, color or national origin in the employment . . . of faculty or staff" constitutes a denial of equal educational opportunity.

6. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

policies in the late sixties. Preferential minority hiring policies only entered the arsenal of equitable remedies in the middle and late seventies. Preferential layoff quotas, along with the hiring policies they were designed to protect, have become the focal point of unresolved controversy in the early eighties.⁷ Second, the progression from assignment, to hiring, to layoff policies reflects a heightening of public and legal controversy as the professional stakes for affected teachers rise.

TEACHER ASSIGNMENT POLICIES

Among the earliest, and least controversial remedies for racially identifiable schools within an unconstitutionally segregated school system were judicially-mandated requirements of racially balanced faculties within each school in the defendant school system. Although these requirements were early relative to judicial orders directed at hiring and layoffs, they were not endorsed by the United States Supreme Court until fourteen years after *Brown v. Board of Education II*⁸ charged lower federal courts with the duty of requiring defendant school systems to act "with all deliberate speed"⁹ in dismantling their dual systems of education. In 1969, in *United States v. Montgomery Board of Education*,¹⁰ the Supreme Court upheld the order of the district court providing that the school board "move toward a goal under which 'in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system.'"¹¹

Although the Supreme Court noted that the federal government portrayed the lower court's assignment policy as a remedy for past assignment of teachers by race,¹² the *Montgomery* case was initiated by the United States' government to bring about "a completely unified, unitary, nondiscriminatory school system" in multiple facets of the system's operation.¹³ It was not an employment discrimination case. As stated subsequently, in *Swann v. Charlotte-Mecklenburg Board of Education*¹⁴ and other desegregation cases brought on behalf of parents and their children, policies and practices regarding faculty are among the "important indicia of a segregated system."¹⁵ When "it is possible to identify a 'white school' or a 'Negro school' simply by reference to the

7. See *infra*, note 32 at 8.

8. 349 U.S. 294 (1955).

9. *Id.* at 301.

10. 395 U.S. 225 (1969).

11. *Id.* at 232.

12. *Id.* at 236.

13. *Id.* at 235.

14. 402 U.S. 1 (1971).

15. *Id.* at 18.

racial composition of teachers and staff," along with other variables, a *prima facie* case of violation of the equal protection clause is shown.¹⁶ The Supreme Court reaffirmed the remedial equitable powers of the federal courts to correct unconstitutional race-conscious assignments of black teachers to black schools and white teachers to white schools, with an alternative race-conscious assignment policy. The *Swann* Court decreed that the ratio of white to black teachers in each school be "substantially" the same as the ratio throughout the system.¹⁷

Lower federal courts followed *Montgomery* and *Swann*.¹⁸ No reference, it appears, has ever been made to any conflict between seniority and mandatory racial balance in teacher assignments. Of course segregative racial assignment policies trammel the freedom of teachers of any race to transfer voluntarily across Jim Crow's racial divide. Integrative racial assignment quotas would also place race above any seniority-acquired rights to voluntary transfers, if, in fact, the right of a teacher to select a school were a seniority-based entitlement.¹⁹ In the context of dismantling unconstitutionally segregated schools, however, courts have consistently upheld the use of racial quotas to achieve teacher (and staff) integration.

Addressing the issue of student assignments on a color-conscious basis, in particular, and the equitable remedial power of the federal courts in general, the Supreme Court in *Swann*, firmed up the legal distinction between *de jure* and *de facto* segregation. Absent a finding of a constitutional violation, an order decreeing "that each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole," would exceed the authority of a federal court.²⁰ On the other hand, absent a finding of unconstitutional

16. *Id.*

17. *Id.* at 19.

18. See, e.g., *Nesbit v. Statesville City Bd. of Educ.*, 418 F.2d 1040 (4th Cir. 1969) (ratio of Negro and white faculty must be "approximately" the same, although exceptions permitted for specialized faculty positions); *Singleton v. Jackson Mun. School Dist.*, 419 F.2d 1211 (5th Cir. 1970).

19. *Kromnick v. School Dist. of Philadelphia*, 555 F. Supp. 249 (E.D. Pa. 1983) appears to be the only decision in which a federal court has recognized that a seniority-acquired expectation of assignment to a particular school within a system is a legally protected interest under federal law. In this case the court held that such an expectation is a "term, condition, or privilege of employment" within the meaning of Title VII, *id.* at 256. For further discussion of *Kromnick*, see *infra* text accompanying note 26. In *Caulfield v. Board of Educ. of New York*, 632 F.2d 999 (2d Cir. 1980), the Second Circuit acknowledged that teachers have a limited "cognizable interest" in avoiding transfers from one school to another, *id.* at 1006, but rejected a Title VII, Title VI, and fourteenth amendment challenge to a teacher assignment quota. Citing its opinion in *Rodriguez v. Board of Educ.*, 620 F.2d 362 (2d Cir. 1980), it confined teachers' limited cognizable interest to transfers that "constitute a serious professional setback" and that are made for improper reasons such as sex discrimination." See, 632 F.2d at 1006, citing, 630 F.2d at 365-66.

20. 402 U.S. at 116.

discrimination, it remains within the broad discretionary power of school authorities to implement such a plan, if, for example, they conclude that it would help "prepare students to live in a pluralistic society. . . ." ²¹ Logically, then, students could not raise a constitutional challenge to such a voluntary race-conscious quota system. What of teachers? Might they claim that a school district's voluntary, or "induced" voluntary quota system, ²² designed to maintain a racially balanced faculty, rather than to remedy past segregation, violates their rights under the Constitution and Title VII? *Swann* suggests not. Under their "broad power to formulate and implement educational policy" school authorities presumably could conclude that students would be better prepared to live in a pluralistic society if exposed to teachers of different races. That is what the Ninth Circuit validated in *Zaslowsky v. Board of Education of Los Angeles City*, ²³ a case initiated by teachers claiming their fourteenth amendment equal protection rights had been violated. There had been no judicial finding of de jure segregation. ²⁴ Nevertheless, citing *Swann* the court upheld the district's faculty balance plan. ²⁵ Thus, in an action framed by teachers as an individual rights, equal employment opportunity case, the circuit court shifted the frame of reference to a students' rights, equal educational opportunity case.

In 1983, however, in *Kromnick v. School District of Philadelphia*, ²⁶ a district court struck down a quota system designed to maintain a racial balance in faculty assignments, rather than to remedy an imbalance. This time the teachers' claims that they had, as employees, a constitutional and Title VII right to be free of nonremedial considerations of race trumped the school district's argument that maintenance of racially balanced faculties enhanced the educational opportunities of the students. ²⁷ Are *Zaslowsky* and

21. *Id.*

22. The term, induced voluntary, is used to refer to policies created by school districts in response to threatened administrative enforcement of Title VI.

23. 610 F.2d 661 (9th Cir. 1979).

24. *Zaslowsky* provides an example of induced voluntary action. The school district had acted in response to a determination by The Office for Civil Rights (then in HEW) that the Los Angeles school district's staff integration plan did not comply with Title VI. See also, *Caulfield*, 632 F.2d 999 (2d Cir. 1980).

25. 610 F.2d at 664.

26. 555 F. Supp. 249 (E.D. Pa. 1983).

27. Philadelphia initially imposed a quota system for assignments at the insistence of The Office of Civil Rights (OCR), in order to remain eligible for federal aid under the Emergency School Aid Act (ESAA), 20 U.S.C. §§ 3191-3207. ESAA, an amendment to Title VI, was repealed in 1982. Philadelphia voluntarily continued the assignment policy, in order to maintain faculty integration within each school, after OCR informed the district that its faculties were successfully integrated. What began as an induced voluntary plan thus changed to the purely voluntary plan challenged by the teachers.

Kromnick in flagrant contradiction? They do indeed read *Swann* differently; the former for the proposition that integration plans "which involve prescribed ratios can be voluntarily adopted by a school board";²⁸ *Kromnick* for the proposition that quota systems can only be used to remedy, not to maintain racial balance.²⁹ The *Kromnick* court attempted to distinguish *Zaslowsky* on grounds that the Los Angeles plan was designed to remedy past discrimination, as identified by the Office for Civil Rights (OCR),³⁰ whereas the Philadelphia plan post-dated an OCR finding that the city had already remedied imbalance in teacher assignments.³¹ True enough; the Philadelphia plan was fully voluntary, whereas the Los Angeles plan was an "induced" voluntary one. However, if *Swann* is read to grant constitutional sanction to voluntary, as well as induced voluntary faculty assignment quotas, the nature of administrative findings, pursuant to Title VI, would be irrelevant.

PREFERENTIAL MINORITY HIRING POLICIES

It was suggested in the previous section that of the three kinds of employment policies addressed in this chapter, the least controversial are those requiring some degree of racial balance in the assignment of teachers to schools. Clearly, they are not above controversy, as exemplified by the *Kromnick* challenge, above all when race is depicted as the premier or sole personal characteristic guiding decisions affecting the professional lives of unique individuals who have, in fact, received specialized training. Still, teacher assignment quotas, like student assignment policies in elementary and secondary education, do not directly determine *whether* or not particular teachers will work. They speak to *where* members of the existing teacher corps will work. And, they apply equally to white and minority teachers alike.

In sum, while they tend to treat teachers as fungible, interchangeable parts, and are usually conceived of as a race-conscious remedy for a victimized racial group (minority students and parents) to which minority teachers qua teachers do not belong, they do not call for preferential treatment to compensate for that victimization. Like retroactive awards of seniority for actual victims of discrimination, under Title VII, they do not pit whites and minorities against each other in a winner-take-all, zero-sum contest.

28. 610 F.2d at 604, citing *Swann* at 16.

29. 555 F. Supp. at 254, citing *Swann* in general, as well as *United States Steel Workers of America v. Weber*, 443 U.S. 193 (1973), for the proposition that a racial quota system must be a temporary measure designed to remedy past discrimination. Weber, however, did not deal with a job assignment plan that affected blacks and whites equally. Rather, it dealt with a voluntary affirmative action plan, granting preferences to blacks over more senior whites in admission to a limited craft training opportunity.

30. 555 F. Supp. at 254.

31. See *supra* note 27.

As one turns to the unresolved issue of preferential teacher hiring (and promotion) quotas as remedies for unconstitutional denial of equal educational opportunity for minority students, the stakes are higher, political and philosophical controversy grows, and judicial uncertainty and contradictions multiply.

The Supreme Court has not yet provided clear guidelines for constitutionally permissible, race-conscious hiring (and lay-off) policies in the public sector generally, much less in the area of teacher employment.³² Thus it is the lower federal courts that have addressed the issue.

Since *Swann* the racial composition of a school system has been accepted as "a useful starting point in shaping a remedy to correct past constitutional violations."³³ But the frame of reference within which the Supreme Court has elaborated on this general and flexible preamble to the shaping of equitable remedies, has been the assignment of an existing student population and teacher corps. The court has not spoken, in desegregation litigation, to the question of increasing the

32. This term the Supreme Court may finally address some of the issues posed in the many-faceted litigation involving charges of "reverse discrimination" in a public sector employment discrimination suit. See *Stotts v. Memphis Fire Dep't*, 679 F.2d 541 (6th Cir.), cert. granted, 103 S. Ct. 2451 (1983). Earlier the Supreme Court avoided resolution of the Title VII and fourteenth amendment challenged to a court order directing that minority firefighters and policemen, who were not victims of past discrimination, be insulated from layoffs. *Castro v. Beecher, sub nom Boston Police Patrolman's Ass'n, Inc., v. Castro*, 103 S. Ct. 2076 (1983) (per curiam) *vacating and remanding* for consideration of mootness.

In 1979, in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), the Supreme Court upheld, against a Title VII challenge, a *private* sector, voluntary collective bargaining agreement, which provided for racial quotas in access to craft training programs. The Sixth Circuit, in *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981), and *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1978), petition for cert. filed, 52 U.S.L.W. 3294 (U.S. Oct. 10, 1983) (No. 83-552), extended Weber's approval of voluntary racial quotas, designed to overcome minority underrepresentation, to the public sector, thus implicating constitutional as well as statutory questions.

In *Stotts* the Sixth Circuit approved a court-approved and court-modified consent decree providing for hiring, promotion and layoff quotas. The Fifth Circuit, in *Williams v. City of New Orleans*, 694 F.2d 987 (5th Cir. 1982) held that the district court had abused its discretion in refusing to approve a consent decree because it contained a provision requiring the promotion of one black officer for every white officer until black officers represented 50 percent of supervisory officers in all ranks. Thus, three of the circuits (the First, Sixth and Fifth) that have addressed the issues of hiring and layoff preferences in school desegregation cases, have endorsed minority group preferences in the public employment context, which benefit individuals who are not legally identified victims of discrimination. The Reagan administration's well-known opposition to preferences for persons who are not actual victims of discrimination has been voiced in the Justice Department's efforts to intervene, in several different ways, in each one of the suits. For a brief overview of the Justice Department's involvement, see Barbash, *Administration Wages Ban on Quotas*, *Washington Post*, Dec. 3, 1983, at A4, col. 1.

33. 402 U.S. at 25.

proportion of minority teachers by means of preferential hiring. Recent decisions involving preferential hiring and layoff policies in the Fort Bend, Boston, Kalamazoo and Buffalo desegregation cases, have, however, split the Fifth, First, Sixth, and Second Circuits respectively. Three times the Supreme Court declined review of the Boston case, *Morgan v. O'Bryant*,³⁴ both before and after the Sixth Circuit's conflicting decision in *Oliver v. Kalamazoo Board of Education*.³⁵ In October 1983, the Buffalo Teachers' Federation petitioned the Supreme Court for review of seniority overrides endorsed in *Arthur v. Nyquist*.³⁶

Within the framework of Title VII "pattern or practice" employment discrimination litigation, the Supreme Court has held, in *Hazelwood School District v. United States*,³⁷ that the proper comparison, for the purpose of establishing a prima facie case of employment discrimination is "between the racial composition of [the] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market."³⁸ It rejected, as irrelevant and incorrect, a comparison between the proportion of black teachers and black students within the school district.³⁹ Furthermore, following *Teamsters v. United States*,⁴⁰ the Court held that a defendant school district is not in violation of Title VII, even if, before the effective date of the Act,⁴¹ it "maintained an all-white work force by purposefully excluding Negroes," so long as its post-Act employment decisions were made in a "wholly nondiscriminatory way...."⁴² From these Title VII theories, several, but not all lower court desegregation cases part company.

Six months following Supreme Court's decision in *Montgomery*, (and two and one-half years before Title VII covered public employment) the Fifth Circuit in *Singleton v. Jackson Municipal Separate School District*,⁴³ directed the many southern school districts

34. *Morgan v. Kerrigan*, 388 F. Supp. 581 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 435 U.S. 935 (1976). *Morgan v. O'Bryant*, 671 F.2d 23 (1st Cir.), *cert. denied sub nom Boston Ass'n of School Adm'rs and Supervisors, AFL-CIO v. Morgan*, 103 S. Ct. 62 (1982), *rehearing denied*, 51 U.S.L.W. 3920 (U.S. June 27, 1983) (No. 82-2124).

35. 706 F.2d 757 (6th Cir. 1983).

36. 712 F.2d 816 (2d Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3344 (U.S. Oct. 20, 1983) (No. 83-665).

37. 433 U.S. 299 (1977).

38. 433 U.S. at 308. Earlier in 1977, in *Castaneda v. Partida*, 430 U.S. 482 (1977), a case dealing with a system for selecting grand juries, the Supreme Court specified a statistical method for measuring the statistical significance of disparities in minority representation in the relevant comparison groups. 430 U.S. at 496-97, n.17, *cited in* 433 U.S. at 309, n.14.

39. 433 U.S. at 308.

40. 431 U.S. 324 (1974).

41. Title VII did not cover public employment until March 24, 1972.

42. 433 U.S. at 309.

43. 419 F.2d 1211 (5th Cir. 1970), *rev'd in part sub nom Carter v. West Feliciana Parish School Bd.*, 396 U.S. 290 (1970).

involved in the consolidated appeal to make hiring and promotion decisions (as well as dismissal and demotion decisions) "without regard to race, color, or national origin."⁴⁴ *Singleton's* "color-blind" language was effectively affirmed by the Supreme Court in 1970.⁴⁵ In 1972 the Fifth Circuit strayed temporarily from the language and logic of color-blind hiring in *United States v. Texas Education Agency*.⁴⁶ Finding a large disparity between the percentage of the faculty who were Mexican-American (3 percent) and the percentage of the school population who were Mexican-American (20 percent), the court held that rigid adherence to the *Swann-Montgomery* principle would be inequitable.⁴⁷ The Austin school district was directed to make a good faith effort "to find sufficient qualified Mexican-American teachers to achieve an equitable ratio . . . [which] would rebut any inference of discrimination."⁴⁸ An "equitable ratio" was defined in terms of a comparison of the ethnic make-up of the faculty to the racial and ethnic composition of the student population. Even though the Fifth Circuit emphatically stressed that the school board need not lower its employment standards,⁴⁹ and proclaimed that the ultimate goal was to apply the faculty racial balance rule, as laid down in *Montgomery* and *Swann*, it had, in fact, voiced one variation on the concept of proportional representation in teacher employment. In *Montgomery* the black-white faculty ratio already "substantially" mirrored the black-white student ratio.⁵⁰ Consequently, in that case, the focus on teacher assignments did not broaden into consideration of affirmative action employment goals or quotas.

No reference was made in *Texas Education Agency* to Title VII, only newly made applicable to educational institutions. *Hazelwood's* admonition—that a gross statistical disparity between the racial composition of a school system's teaching staff and that of its student population does not make out a prima facie case of employment discrimination—lay five years in the future. In 1981, five years after *Hazelwood's* admonition, however, the Fifth Circuit was again confronted by the claims of Mexican-American school children and their parents in *Castaneda v. Pickard*.⁵¹ The minority plaintiffs alleged that they had

44. *Id.* at 1218.

45. 396 U.S. 290 (1970). The Supreme Court only reversed the Fifth Circuit's deferral of student desegregation. *Singleton* was decided soon after *Alexander v. Holmes Cty. Bd. of Educ.*, 396 U.S. 19 (1969), sent *Brown II's* "doctrine of deliberate speed to its final resting place," 419 F.2d at 1211.

46. 467 F.2d 848 (5th Cir. 1972).

47. *Id.* at 873.

48. *Id.*

49. *Id.*

50. This was the observation of the Fifth Circuit in *Texas Education Agency, id.*

51. 648 F.2d 989 (5th Cir. 1981).

been denied equal protection as a result of discrimination in the employment of Mexican-American teachers. Their claims were premised on the fourteenth amendment, Title VI, and the Equal Educational Opportunities Act of 1974, all of which, the Fifth Circuit ruled, required proof of intentional discrimination.⁵² Their claims were not based on Title VII, for they were seeking vindication of the students' rights to equal educational opportunity. Nevertheless, this time the Fifth Circuit held, citing *Hazelwood*, that an order to establish a prima facie case of intentional discrimination in teacher employment, the relevant statistical comparison is between the racial (or ethnic) composition of the teaching staff and the relevant labor market—loosely defined as the "pool of people qualified to fill" the teaching positions.⁵³ The Title VII model for establishing a prima facie case of intentional pattern or practice discrimination was thus adopted.⁵⁴ With *Castaneda* the Fifth Circuit affirmed the right of minority parents and children to challenge discrimination in the hiring (and promotion) of teachers and staff belonging to the same minority. But it discarded the theory of proportional representation suggested in *Texas Education Agency*. It required that in school desegregation litigation, the employees, not just the children, actually be shown to be victims of intentional discrimination.

Since *Castaneda* was remanded in light of *Hazelwood's* requirement that the relevant labor market for teachers must be separately and

52. *Id.* at 1000-1001. In 1983, in *Guardian's Ass'n v. Civil Serv. Comm'n of the City of New York*, 103 S. Ct. 3221 (1983), seven justices agreed that Title VI itself requires proof of discriminatory intent. Five justices, however, agreed that Title VI's implementing regulations may validly incorporate a disparate impact standard. Therefore a majority agreed that a Title VI plaintiff can seek injunctive relief, but not damages, for unintentional violations of Title VI and its implementing regulations. There was no opinion for the court.

53. 648 F.2d at 1002.

54. However, the Fifth Circuit did not adopt in entirety the Title VII model for allocating the burdens of proof as set forth most recently in *Texas Dep't of Commun. Affairs v. Burdine*, 450 U.S. 248 (1980). *Burdine* reiterated that the ultimate burden of persuading a court that defendant engaged in intentional discrimination lies with the plaintiffs in a Title VII disparate treatment case. The defendant need only rebut the plaintiffs prima facie case by producing "admissible evidence" in support of a defense that its actions were motivated by legitimate nondiscriminatory reasons. It remains for the plaintiff to persuade a court that these reasons are pretextual. In *Castaneda v. Pickard*, however, the Fifth Circuit, looking to *Swann* and *Keyes v. Denver School Dist. No. 1*, 413 U.S. 189 (1973), placed a more onerous burden of rebuttal on defendant school districts. They must persuade the court under a "clear and convincing evidence" standard that the challenged employment practices were motivated by legitimate, non-discriminatory reasons, 648 F.2d at 994. Thus, for the Fifth Circuit the ultimate burden of proof in a school desegregation case, in contrast to a Title VII case, rests with the defense. *Cf.*, *Evans v. Harrison Cty. Bd. of Educ.*, 684 F.2d 304 (4th Cir. 1982) (shifting the burden of persuasion to the defendant is proper in employment discrimination case where formerly dual system assigned black principals to black schools and whites to white schools).

distinctly defined from the general population, the Fifth Circuit did not specify what a school district must do in order to achieve a unitary school system. Later in 1981, in *Fort Bend Independent School District v. City of Stafford*,⁵⁵ the Fifth Circuit more clearly restated its position on hiring. A school system which formerly engaged in, or arguably engaged in employment discrimination, will be deemed unitary if its current practices "are non-discriminatory and consistent with recommended techniques for sound affirmative action programs."⁵⁶ Given the lack of consensus about what constitutes a sound affirmative action program, the *Fort Bend* decision still left some clarity to be desired. Nevertheless, in revisiting *Singleton* it held that neither the fact that a school system has a smaller percentage of minority faculty than it did prior to desegregation, nor the fact that the district has a smaller percentage of minority faculty than the minority student population, precludes a determination that the system is a unitary one.⁵⁷

Given the geography of its jurisdiction, the Fifth Circuit has been the appellate court most extensively involved in school desegregation litigation. Its decision in *Singleton*, reaffirmed in *Fort Bend*, had been upheld by the Supreme Court. Nevertheless, its acceptance (in large measure)⁵⁸ of the Title VII frame of reference, its rejection of hiring goals or fixed quotas based on the minority student population, or the minority population of the school district in general, has been rejected in two of the three other circuits that have grappled with the issue.

The First Circuit, in the complex, long drawn-out desegregation litigation involving Boston's public schools, has taken a position on hiring and layoffs which differs most fundamentally from the position of the Fifth Circuit. In 1976 the First Circuit affirmed the decision of the district court ordering the Boston School Committee to hire black and white teachers on a one-to-one basis until the percentage of black faculty reached twenty percent of the total.⁵⁹ Once the twenty percent quota had been reached the school committee had an affirmative duty to recruit minority teachers until a figure of twenty-five percent black faculty was achieved.⁶⁰ Although the district court concluded that the existing percentage of black faculty could be attributed to

55. 651 F.2d 1133 (5th Cir. 1981).

56. *Id.* at 1136.

57. *Id.* at 1140. See also, *United States v. Wilcox Cty. Bd. of Educ.*, 494 F.2d 575 (5th Cir.), *cert. denied*, 419 U.S. 1031 (1974), *Lee v. Macon Cty. Bd. of Educ.*, 482 F.2d 1253 (5th Cir. 1973).

58. See *supra* note 54.

59. *Morgan v. Kerrigan*, 530 F.2d 431 (1st Cir. 1976), *aff'g* 388 F. Supp. 581 (D. Mass. 1975), *cert. denied*, 426 U.S. 935 (1976).

60. 530 F.2d at 434.

unconstitutional hiring discrimination,⁶¹ the remedy was devised to "make whole" the only judicially identified victims of discrimination—Boston's black school children. The 20 percent goal was based on the black population of Boston. This figure was below the percentage of black students in the school population (35 percent), and well above the percentage of "black college students in Boston or in the Northeast," which, the school committee argued, reflected the "available pool of teachers" (5.25 percent and 4.24 percent respectively).⁶² The only Supreme Court school desegregation cases cited by the First Circuit in 1976 were *Swann* and *Green v. County School Board*,⁶³ the former as to the federal courts' broad and flexible remedial power to fashion remedies in school desegregation cases; the latter for its dictate that segregation and its effects must be eliminated "root and branch."⁶⁴ The First Circuit explicitly rejected employment discrimination cases as irrelevant when it discussed hiring goals in its 1982 decision affirming layoff policies granting preferences to blacks. Nevertheless, in upholding the hiring preferences in 1976, it relied on the argument that "the union had done nothing to rebut the natural inference that the ratio of blacks in the appropriate pool . . . roughly reflects the 20 percent figure chosen by the district court."⁶⁵ This language was at least loosely related to *Hazelwood*. In 1982, however, the First Circuit added two alternative theories to justify ordering faculty representation in proportion to the black-white presence in the community. The first was the "role model" argument, borrowed from the opinion of the district court in *Oliver v. Kalamazoo Board of Education*,⁶⁶ and subsequently rejected by the Sixth Circuit Court of Appeals. Black students need black role models "because they can encourage minority students to higher aspirations and at the same time work to dispel myths and stereotypes about their race."⁶⁷ The second might be called the minority community involvement theory. An integrated faculty and staff, one reflecting the racial composition of the community, is "necessary to bring black students and parents fully into the school community."⁶⁸

61. *Morgan v. Hennigan*, 379 F. Supp. 410, 456-66 (D. Mass. 1974), *aff'd sub nom*, *Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974). The finding of employment discrimination was based, in part, on defendants' over-reliance on the National Teachers Exam (NTE), in spite of their awareness of its disproportionately adverse impact on blacks, and in disregard of studies indicating the NTE did not have substantial predictive validity, 379 F. Supp. at 463.

62. 388 F. Supp. at 582-583.

63. 391 U.S. 430 (1968).

64. *Id.* at 438.

65. 530 F.2d at 434.

66. 498 F. Supp. 732 (W.D. Mich. 1980).

67. *Morgan v. O'Bryant*, 671 F.2d at 27, *citing* 498 F. Supp. at 748.

68. 671 F.2d at 27.

The hiring quota, and the role model argument the district court used to justify imposition of the quota on Kalamazoo's school system, did not survive on appeal to the Sixth Circuit Court of Appeals. In its 1980 decision, the one cited by the First Circuit in *Morgan v. O'Bryant*, the district court interpreted its 1973 decision as ultimately requiring a staff which, in each of four categories—supervisors, administrators, teachers and counselors—would be 20 percent black.⁶⁹ The 20 percent figure was first recommended as a "guideline" in 1969, prior to the initiation of any legal action, by a Citizen's Committee on Integration appointed by the President of the School Board. The 20 percent figure, as far as the Sixth Circuit could determine in 1983, "appeared" to be based on the percentage of black students in the Kalamazoo system in 1968.⁷⁰ It exceeded significantly every 1977-78 labor market indicator identified by the court-ordered "Green-Cohen Report":⁷¹ black applicant rate (11.7 percent); black population of Kalamazoo County (5.5 percent); black population of Michigan (9.7 percent); education degrees earned by blacks at Michigan colleges and universities in 1976-76 (10 percent). That the percentage of black teachers in 1977-78 (11.6 percent) met or exceeded the figures did not satisfy the district court, however. It upheld the 20 percent goal as "required" for Kalamazoo to achieve unitary status.⁷² The "critical mass" of black teachers and administrators required to insure enough role models could not be achieved with goals based on labor market statistics. For the district court, as for the First Circuit, *Hazelwood* and *Teamsters* were thus utterly irrelevant.⁷³

For the Sixth Circuit Court of Appeals, on the other hand, Title VII cases, while not controlling, were not extraneous either. In declaring the district court's 20 percent hiring quota "arbitrary,"⁷⁴ the circuit court cited *Teamster's* caveat that courts "should take practicalities into account in devising remedies under Title VII and in any equitable decree."⁷⁵ In spite of vigorous minority hiring efforts, which had raised the black teacher ratio above most labor market indicators, Kalamazoo had not been able to attain the 20 percent goal, "apparently because a

69. 498 F. Supp. at 747.

70. 706 F.2d at 759.

71. This Report resulted from a 1977 order of the district court appointing Dr. Wilbur Cohen and Dr. Robert Green as court experts. They were to evaluate a court-ordered report prepared by the Kalamazoo Board of Education on the implementation of the district court's 1973 desegregation order. Dr. Cohen, former Secretary of Labor, was Dean of the School of Education at the University of Michigan. Dr. Green was Dean of the College of Urban Development at Michigan State University.

72. 498 F. Supp. at 748.

73. *Id.* at 746.

74. 706 F.2d at 763.

75. *Id.* at 762.

disproportionate number of black teachers leave for more lucrative opportunities in the private sector," and because of the high rate of promotion of black teachers to administrative positions.⁷⁶

The Sixth Circuit also repudiated the possibly testable, but unsupported and unanalyzed district court conclusion that the 20 percent quota "represented the 'critical mass' of black role models *necessary* for black students. . . ." ⁷⁷ Aligning itself in large, although not complete measure with the Fifth Circuit's opinion in *Fort Bend*, the Sixth Circuit, in *Oliver*, held that students "do not have a constitutional right to attend a school with a teaching staff of any particular racial composition." ⁷⁸ As regards the teaching staff, "all that students are entitled to is the 'sustained good faith effort to recruit minority faculty members so as to remedy the effects of any past discriminatory practices.'" ⁷⁹ The Kalamazoo Board of Education had satisfied this entitlement with its track record in hiring over a ten-year period; 23.6 percent of "new teacher hires" had been black.

Compared with the various labor market statistics, Kalamazoo's recruitment and hiring results suggested vigorous affirmative action in which race had been given a considerable plus. In *Fort Bend* the Fifth Circuit talked loosely of nondiscriminatory, "sound" affirmative action programs, without reference to any of many conflicting regulations and judicial opinions on the subject. In *Oliver*, the Sixth Circuit cited *University of California v. Bakke*⁸⁰ for the greater wisdom of using "flexible" affirmative action programs, which credit minority race a plus, over resort to inflexible quotas.⁸¹ *Bakke*, lacking a majority opinion, has been cited by all sides on the issue of preferential group rights. A head count tally reveals a majority of justices favoring, albeit for different reasons, minority preferences for individuals who, like the teachers in the Kalamazoo case, are not themselves legally identified victims of discrimination. By citing *Bakke*, the Sixth Circuit, far more

76. *Id.* at 762, citing 498 F. Supp. at 738, n.4.

77. 706 F.2d at 762. (emphasis added) The circuit court noted that the 20 percent goal was not one of the "Green-Cohen Report" recommendations, *id.* at 763.

78. 706 F.2d 762.

79. *Id.* at 762, citing 651 F.2d at 1140.

80. 438 U.S. 265 (1978).

81. 706 F.2d at 757. But the Sixth Circuit did not absolutely rule out quotas per se. A violation of the students' constitutional rights "may be sufficiently egregious to warrant a temporary teacher hiring quota. . . .", 706 F.2d at 763. It was the Sixth Circuit that upheld a voluntary affirmative action plan, giving black patrolmen promotion preferences ahead of white patrolmen on the eligibility list in *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981). [Hereinafter cited as DPOA] DPOA extended to the public sector the Supreme Court's holding in *United Steelworkers of America v. Weber* that Title VII does not prohibit (in the absence of judicially identified, unlawful discrimination) preferences designed to overcome minority underrepresentation.

clearly than the Fifth Circuit, signals support for preferential minority hiring.⁸²

The Fifth Circuit has required, as a remedial predicate for more minority hiring in school desegregation cases, that intentional employment discrimination be shown. The court places a heavier burden of justification on the defendant school system to justify disparities between the proportion of minority teachers and the proportion of minorities in the relevant labor market than is required in Title VII cases.⁸³ Nevertheless, it has required plaintiff school children and their parents to follow the Title VII (*Hazelwood*) model for establishing a *prima facie* case of discriminatory hiring.

The First Circuit, on the other hand, has not held that proof of employment discrimination is a prerequisite of judicially-mandated, minority hiring preferences (although the district court found that the Boston School Committee had engaged in racially discriminatory hiring).⁸⁴ In conflict with the Fifth Circuit, the First Circuit has discarded Title VII cases as beside the point and held that minority students do have a constitutional right to attend schools with a teaching staff whose racial composition approximates the racial composition of the school district.

The Sixth Circuit, in contrast to the Fifth Circuit, and in accord with the First Circuit, has not held that proof of intentional employment discrimination is a precondition for preferential hiring of minority teachers in school desegregation cases. In the Kalamazoo litigation the district court made no finding of discrimination in teacher hiring prior to 1969 and no one claimed there had been any such discrimination thereafter.⁸⁵ In agreement with the Fifth Circuit, and in conflict with the First Circuit, however, the Sixth Circuit rejects the idea that students, who are proven victims of unconstitutional segregation, have a constitutional right to a teaching staff of any particular racial composition. But the Sixth Circuit, unlike the Fifth Circuit, has not ruled out quota hiring *per se*. Furthermore, the Sixth Circuit, unlike Fifth Circuit has clearly endorsed hiring that takes the minority race very much into account.

82. *Bakke* involved admissions to competitive graduate education. The only Supreme Court decisions dealing with an employment discrimination claim brought under Title VI is *Guardians Ass'n v. Civil Service Comm'n of N.Y.C.*, 103 S. Ct. 3221 (1983). The outcome suggests Title VI employment discrimination cases, which may be limited to situations in which employees are paid out of federal funds, note 3 *supra*, are likely to parallel Title VII employment discrimination cases. For a discussion of the remedy affirmed in *Guardians Ass'n*, see Martha McCarthy's chapter in this book.

83. See *supra* note 54.

84. See *supra* note 61.

85. 706 F.2d at 762 n.2.

Finally, the appellate court that has spoken most recently on the theme of preferential teacher hiring as a remedy for students' rights, is the Second Circuit in the Buffalo desegregation litigation. Its opinion in *Arthur v. Nyquist*⁸⁶ yields yet another variation on this unsettled policy question. Along with the First and the Sixth Circuits, the Second Circuit did not hold that proof of discrimination in the hiring of teachers is a precondition for a preferential hiring plan, although the district court had held that the failure of the Buffalo Board of Education to increase the percentage of minority teachers in a meaningful amount, over a ten year period, was an intentional act of discrimination.⁸⁷

In accord with the First Circuit, but not with the Fifth and Sixth Circuits, the Second Circuit approved the district court's order requiring that the Buffalo School Board hire minority and white teachers on a one-to-one basis. Unlike the First Circuit, however, the Second Circuit did not formally rule on the validity of the district court's minority hiring goal—21 percent for Buffalo—since the target figure was not challenged in the appeal.⁸⁸ The district court in New York, like the district court in Massachusetts, had fixed the target on the basis of minority presence in "the community at large."⁸⁹ Even though the Second Circuit did not rule on this proportional representation remedy, it did not fail to note, citing the Sixth Circuit's opinion in *Oliver v. Kalamazoo* "that other jurisdictions have been *unwilling* to approve teacher quotas based on the percentage of minority students in a school district or on minority population in a municipality."⁹⁰

Given the procedural reason for excluding appellate consideration of the population-based hiring goal, the Second Circuit has not explicitly ruled against the proportional representation concept. Its reference to the Sixth Circuit's position in *Oliver* suggests nevertheless that it would reject it. Its position on the lawfulness of layoff quotas (discussed below), the issue to which the hiring quota was inextricably linked, suggests further, that on the hiring remedy the Second Circuit stands somewhere between the First and Sixth Circuits: according minority race a significant plus through resort to an inflexible quota (one-to-one hiring) is acceptable; both color-blind hiring and color-conscious, proportional representation are rejected, however.

86. 712 F.2d 816 (2d Cir. 1983).

87. *Arthur v. Nyquist*, 520 F. Supp. 961, 1963 (W.D.N.Y. 1981), *citing* *Arthur v. Nyquist*, 415 F. Supp. 904, 944-48 (W.D.N.Y. 1976), *aff'd in relevant part*, 573 F.2d 134 (2d Cir.), *cert. denied sub nom. March v. Arthur*, 439 U.S. 860 (1978).

88. 712 F.2d at 823 n.6.

89. *Id.* at 818.

90. *Id.* at 823 n.6 (emphasis added).

TEACHER LAYOFF POLICIES

Racially or ethnically-based layoff quotas, even more than hiring quotas, pit minorities and whites in a winner-take-all contest. Both determine whether teachers will work, not where they will work, at least within the system subject to desegregation remedies. Among workers accustomed to seniority systems, however, layoff quotas escalate tension further because they attack vested interests. Where seniority systems have framed the rules of a workplace untainted by vestiges of a history of race discrimination, they are perceived as guarantors of fairplay—of freedom from arbitrariness—however unmeritocratic they may be. However, in a workplace tarnished by employment discrimination against racial and ethnic minorities (and women), they perpetrate inequities toward individual discriminatees and can even be crudely anti-meritocratic. In *Franks v. Bowman Transportation Company*⁹¹ and *Teamsters v. United States* (Title VII hiring discrimination cases) and in *Guardians Association v. Civil Service Commission of New York City*⁹² (a Title VI hiring discrimination case), the Supreme Court endorsed the use of retroactive seniority to help make identified victims of discrimination whole. They are inserted into their "rightful place" in the seniority ladder because of their personal victimization. These Title VII and Title VI remedies are consistent with an individual rights theory of equal employment opportunity. Competitive status seniority is perfected, not rejected. Such an individualistic approach to employment opportunity is not, however, the operational theory underlying the position of the courts that have endorsed hiring preferences as remedies in school desegregation cases. Hiring preferences are grounded in nonindividualistic, social and psychological theoretical assumptions about the needs of non-employees—the minority students and the minority community. So are group layoff preferences. To what extent then have the same four appellate courts that have addressed hiring remedies, rejected or accepted group preferences that challenge the very concept of seniority?

In 1979, in *Singleton*, the Fifth Circuit enunciated two principles which were to govern layoffs in school systems undergoing a conversion from completely dual to desegregated systems. First, the court provided that when a reduction in the teaching corps is caused by the process of dismantling a dual system, "dismissals" must be carried out pursuant to "objective and reasonable, non-discriminatory standards."⁹³ This principle is theoretically consistent with *Singleton's* insistence on

91. 424 U.S. 747 (1976).

92. 103 S. Ct. 3221 (1983).

93. 419 F.2d at 1218.

"color-blind" hiring. It is not necessarily inconsistent with the Fifth Circuit's decision in *Fort Bend*, but in the absence of elaboration on what non-discriminatory practices, consistent with "recommended techniques for sound affirmative action programs" means, uncertainty remains.

The second of *Singleton's* principles governing dismissals required that qualified faculty, black and white, laid off because of desegregation caused, reductions-in-force, have the right of first refusal with respect to subsequent vacancies for which they are qualified.⁹⁴ Thus, if a position were to open up for which either a laid off white or a laid off black is qualified, it would go to that individual. What would happen if both blacks and whites were qualified was not spelled out. Nevertheless the logic of *Singleton* suggests that seniority could be a principle governing the choice between the white and the black teacher. This is buttressed by the fact that the Fifth Circuit did not extend the reinstatement preference to layoffs not caused by desegregation itself.⁹⁵

In many parts of the Jim Crow south, over which the Fifth Circuit had jurisdiction, many blacks were in the teaching profession in the decades of the fifties and sixties. *Singleton's* principles, if followed in good faith, may not have threatened a severe reduction in the percentage of black teachers. The situation in Boston, in 1981, was clearly different. When a budget crisis forced consideration of "massive layoffs" of teachers, the operation of the collectively bargained seniority principle would have drastically reduced the percentage of black teachers.⁹⁶ It had reached 19.09 percent by 1981, not far short of the 20 percent goal ordered in 1975. In 1982 the First Circuit affirmed three principles (articulated by the district court) which were to govern fiscally-caused layoffs. First, the existing percentage of black teachers was to be maintained in order to preserve progress toward the 20 percent target.⁹⁷ Second, laid off black teachers were to be given an "absolute preference in recall until the 20 percent goal is reached."⁹⁸ These two principles are consistent with the First Circuit's position on hiring. To protect the principle of proportional representation, race must override seniority. Not surprisingly, therefore, the First Circuit explicitly rejected as inapposite the approach to retroactive seniority taken in *Teamsters* and *Franks*, limiting (under Title VII) retroactive awards of

94. *Id.*

95. For a recent reaffirmation of this point, see *Pegues v. Moorhouse Parish School Bd.*, 706 F.2d 735 (5th Cir. 1983). See also, *Cousin v. Board of Trustees*, 648 F.2d 293 (5th Cir. 1981); *Wright v. Houston Indep. School Dist.*, 569 F.2d 1383 (5th Cir. 1978).

96. 671 F.2d at 25.

97. *Id.*

98. 671 F.2d at 25 n.3.

seniority to identified victims of hiring discrimination.⁹⁹ The teachers hired in Boston, pursuant to desegregation remedies, were not identified victims of hiring discrimination. Nor were they hired to remedy hiring discrimination against other members of their racial group.

By endorsing the third of the district court's layoff principles, the First Circuit made one concession to the expectations which non-black teachers had derived from seniority. The School Committee was temporarily relieved of the 25 percent recruitment goal until all laid off tenured teachers had been recalled.¹⁰⁰ Thus new black hires could not be preferred over displaced tenured whites or tenured non black minorities.

On the subject of hiring and layoff remedies the Fifth Circuit and the First Circuit remain at consistent odds. On layoffs, as on hiring, the Sixth Circuit again parts company with both.

In *Oliver* the Sixth Circuit, like the First Circuit, was faced with a conflict between contractual seniority rights and a district court order nullifying them in order to prevent the layoff of a disproportionate number of minority teachers and a regression from the 20 percent hiring goal. The circuit court acknowledged the benefits and pervasiveness of seniority in the labor field.¹⁰¹ It drew attention to *American Tobacco Company v. Patterson*,¹⁰² a Title VII case in which the Supreme Court stressed the "overriding importance" of seniority provisions. The Sixth Circuit did not exalt seniority over race, however, and endorse Title VII models. It accepted, in principle, the idea that remedies "necessary" to vindicate students' constitutional rights might require a seniority override.¹⁰³ Still, in the Kalamazoo case it rejected completely the district court's nullification of the tenure and seniority rights of white teachers. No evidence was produced to support the district court's "critical mass" role model theory. Hence it had not been shown that a seniority override, designed to protect progress toward the "arbitrary" hiring goal, was "necessary" to protect the constitutional rights of the children.¹⁰⁴ What is more, the district court's order overriding the seniority rights of white teachers did not even meet the Sixth Circuit's concept of reasonableness.¹⁰⁵ This was the less rigorous "standard" the Sixth Circuit had used in upholding a "voluntary affirmative action" promotion plan, in an employment discrimination

99. *Id.* at 27. See Martha McCarthy's chapter in this book.

100. *Id.* at 28.

101. 706 F.2d at 763.

102. *Id.* at 763, citing 102 S. Ct. 1534 (1982).

103. 706 F.2d at 763.

104. 706 F.2d at 764.

105. *Id.*

suit, in *Detroit Police Officers Association v. Young* (DPOA).¹⁰⁶ The Sixth Circuit distinguished the stakes and circumstances involved in *Oliver*. In *DPOA*, the minority promotion preference, designed to correct what the defendant Police Department had identified as unlawful employment discrimination, could reasonably deprive whites of some promotion opportunities. But unlike the district court's order in *Oliver*, the Police plan did not deprive whites of "vested employment rights."¹⁰⁷ To deprive white teachers of strong and legally established expectations in a school desegregation case not only demanded a showing of necessity. In the absence of evidence supporting the role model theory, and in light of the fact that "the percentage of black teachers after the layoffs . . . , [was] comparable to a number of relevant labor market indicators," it was unreasonable to override the teachers' expectations in seniority.¹⁰⁸

In *Arthur v. Nyquist* the Second Circuit was faced simultaneously with a challenge to the constitutionality of both the layoff and hiring quotas decreed by the district court. Its position on layoffs, like its position on hiring quotas was again at variance with the other three circuits. The Second Circuit upheld the lower court's mandate that future teacher layoffs be made on a percentage basis, in order to protect "the existing ratio of minority to majority teachers." Thus, in accord with the First Circuit, it abjured the Supreme Court's Title VII cases, holding that bona fide seniority systems—those created and maintained without discriminatory intent—must be honored. The statutory

106. 608 F.2d 671 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981). See discussion of *DPOA* *supra* note 32.

107. 706 F.2d at 763-64 n.6.

108. 706 F.2d at 764. The Sixth Circuit's opinion in *Oliver* appears to stand in clear opposition to the decision of the district court for eastern Michigan in *Wygant v. Jackson Bd. of Educ.*, 546 F. Supp. 1195 (E.D. Mich. 1982). Jackson School District's collectively bargained contract stipulated a hiring goal which would achieve minority representation on "each individual staff" of at least the same percentage as the minority representation in the student population, broken down into four minority subgroups, *id.* at 1198. In upholding the contract's layoff provision, which was designed to achieve, or to protect progress toward Jackson's version of proportional representation, the *Wygant* court followed the lead of the district court for western Michigan in *Oliver*. This included recourse to its role-model theory, expanded in *Wygant* to encompass the needs of American Indians, Orientals, and persons of "Spanish descendency," as well as blacks, *id.* at 1198, 1201. The *Wygant* court also relied on the Sixth Circuit's decision in *DPOA*, extending *Weber's* holding (see *supra* note 32) to the public sector, that a judicial finding of employer discrimination is not a pre-condition for a lawful, voluntary affirmative action plan containing racial preferences. Although the *Jackson* plan, like the *DPOA* plan, was a voluntary one, and the *Kalamazoo* plan, which the Sixth Circuit rejected, was judicially decreed, this difference does not reconcile *Wygant* with the Sixth Circuit's opinion in *Oliver*. The crux of the latter's rejection of the district court's 20 percent quota was that it nullified seniority and tenure rights (which the *DPOA* plan did not) in the absence of support for the argument that a "critical mass" of black role models is necessary for black students.

rights of senior, non-minority teachers in Buffalo could be overturned in order to vindicate the constitutional rights of minority children. On the other hand *Arthur v. Nyquist* did not endorse the First Circuit's requirement in *Morgan* that layoff policies must protect the population-based hiring target. The percentage of minority teachers in Buffalo (14 percent), to be protected against layoffs, was well below the 21 percent hiring target the district court had set, and upon which the Second Circuit did not rule.

Finally, the Second Circuit also rejected the First Circuit's approach to the recall of excessed teachers. The First Circuit endorsed an absolute black rehiring preference until Boston reached its 20 percent goal. The Second Circuit, on the other hand, rejected the district court's one-to-one recall order, designed to progress toward the 21 percent goal, which the district court had set for Buffalo. The Sixth Circuit had demanded a finding of "necessity" to justify *any* impairing of seniority-based layoff rights. The Second Circuit, taking a compromise position between the three other circuits, only demanded a finding of "demonstrable necessity" to justify impairing seniority-based rehiring rights.

CONCLUSION

Litigation dealing with employment-related remedies in school desegregation cases, like employment discrimination litigation, is complex, nuance-ridden, and, on the issues of hiring and layoff preferences, contradictory and unresolved.

The only teacher personnel remedy upon which there exists a judicial consensus is that courts may order racial balance in faculty assignments as one remedy for de jure segregated school systems. Possibly this consensus may not extend to a school district's voluntary creation or maintenance of an assignment quota that is not designed to remedy an unlawful imbalance. This is what the district court's opinion in *Kromnick* suggests: an equal employment opportunity challenge to involuntary transfers on the basis of race defeated a school district's policy-making discretion to use assignment quotas as a means of maintaining faculty integration. *Kromnick* is hardly a definitive ruling, however. It ignored *Swann*'s support for the exercise of school board discretion, in the absence of a constitutional violation, in an integrative direction. *Kromnick* also glossed over a significant distinction by its reliance on the Supreme Court's decision in *United Steel Workers v. Weber*¹⁰⁰ (which held that Title VII, does not prohibit a *private* sector,

100. 443 U.S. 193 (1979).

race-conscious affirmative action plan.) As the *Kromnick* court noted, the racial quota upheld in *Weber* was a temporary measure designed to correct "a manifest racial imbalance;"¹¹⁰ it was not aimed at permanently maintaining a racial imbalance. But *Kromnick* downplays the critical fact that *Weber* dealt with preferential rationing of access to scarce training positions. *Weber's* implied rejection of quotas that perpetuate racial balance was directed at perpetuation through ongoing preferences. Philadelphia's race-conscious faculty assignment plan was aimed at maintaining racial balance. But it did not entail racial preferences.

The Supreme Court has never ruled, in a public sector, Title VII employment discrimination case, that hiring, promotion or layoff preferences, designed to protect or advance a racial, gender or ethnic group, may be imposed by court order or a judicially-endorsed consent decree.¹¹¹ Its Title VII decisions have endorsed remedies which accord relief, including constructive seniority, to judicially identified ("actual") victims of discrimination. Thus, the Supreme Court's public sector Title VII interpretations have remained within the confines of an individualistic conception of legal justice—of giving the individual his or her due under a statutory scheme prohibiting discrimination in employment. The notion of "make whole" relief has been limited to placing the victim of unlawful employment practices in a position he or she would have occupied but for the particular defendant's unlawful discrimination. A number of lower federal courts have moved beyond the conception of justice to the individual in Title VII cases. They have decreed or approved of preferences designed to render "compensatory justice" to groups to which the nonvictim beneficiaries belong.¹¹² Group preferences, like make whole relief for individuals, are both referred to as remedial. But in the first case they remedy legal wrongs to individuals. In the latter they are designed to remedy the putative or judicially determined, deprived employment status of the preferred protected class. It is not a matter of the individual getting his or her due; the individual beneficiary is proxy for a group, many of whose members are dead and/or too old to have benefitted from Title VII.

110. *Id.* at 208-209. Since the quota plan was the product of a collective bargaining agreement—hence voluntary—there had been no judicial determination that *Kaiser Aluminum* was guilty of excluding blacks from craft unions. But, the Court pointed out, "[J]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice", *id.* at 198 n.1.

111. *Stotts*, *supra* note 32, may provide some answers. Unlike *Weber*, which involved a voluntary, private sector plan, *Stotts* involves judicial modification of a consent decree, which created hiring and promotion quotas for minority city firefighters.

112. See *supra* note 32.

Controversy over justice to individuals and compensatory justice to groups, which has raged for years, and remains unresolved in the public employment context, lies beyond the scope of this chapter. It can be suggested, however, that even some advocates of compensatory justice for groups in certain employment contexts might question teacher employment preferences, based on proportional representation concepts, as remedies for segregated schooling.

Like beneficiaries of lower court, Title VII group preference cases, minority teachers who benefit from hiring and layoff preferences are not judicially identified victims of discrimination. But unlike Title VII beneficiaries they are not, in theory, hired and retained to compensate for past employment discrimination against other members of their group. The espoused remedial notion underlying teacher employment preferences is that they will make the minority students—the identified victims of discrimination—whole. They are to be restored to an educational condition they would have occupied but for the defendant school district's unlawful discrimination. But when the target of the minority employment preferences is proportional representation, will they really? This is the general question the Sixth Circuit posed in *Oliver*. It evokes a host of specific questions.

The link between group preferences and group underrepresentation (however determined) in a particular labor force is at least clear in employment discrimination cases. Preferences can alter underrepresentation. But the link between group preferences for minority teachers and the educational opportunity for minority students is far more tenuous, at least when proportional representation is the ultimate goal.

The role model argument is the lead rationale offered to justify a teacher corps that reflects the minority presence in the student population or the school district. As expressed by the district court in *Oliver* and endorsed by the First Circuit in *Morgan*, it was stated as an unsupported, self-evident proposition. For this reason, the Sixth Circuit—the court that upheld minority preferences in employment cases—rejected it.

The notion that many students may be positively influenced by the presence of persons of the same social identity in positions of influence and authority is experientially and intuitively plausible. But it is not at all self-evident what percentage of race-alike or ethnic-alike teachers are necessary to enhance student hopes and aspirations. Indeed, considering heightened public awareness that teaching is lamentably an undervalued, relatively low status professional career, it could just as plausibly be argued that adult minorities raise hopes and aspirations more by entering other, higher status careers.¹¹³ It is not self-evident

113. One explanation for the low status of elementary and secondary school teaching is that it has traditionally been a career for a disproportionate number of professional women and blacks.

that resort to hiring preferences which reject, and are strikingly out of line with labor market indicators will bring about the psychological benefits anticipated. An employment quota that places a far higher premium on race or ethnicity than on personal competence, commitment and empathy risks perpetuation of negative stereotypes among minority and majority students alike, and possibly a decline in the educational opportunity for minority students whom the remedy is supposed to make whole. It is not self-evident that all minority parents, treated as an undifferentiated class for legal purposes, in fact believe proportional representation of race-alike or ethnic-alike faculty is necessary to meet their childrens' pressing educational needs.

Finally, two ironies of resort to racial quotas to achieve proportional representation in teacher employment deserve comment. One is that it reveals an attitude that underestimates the skill and training required for excellence in teaching, which is what educational opportunity is presumably about. Courts may treat elementary and secondary school teachers as an undifferentiated bevy of certified or certifiable college graduates, but they rarely treat faculty in higher education or other professions in the same way.

Another irony of a proportional representation remedy is that, in the name of integration within one school system subject to desegregation litigation, a court may end up reinforcing the racial identifiability of regional school systems. Boston, with its large and growing proportion of poor minority school children is ordered to engage in aggressive minority recruitment efforts. What does that do for the racial composition of the faculty in white and more affluent Brookline, Belmont, Arlington and Newton? They are under no similar judicial mandate. If they voluntarily initiate sustained, good faith minority recruitment efforts, they must, to some degree, come into competition with Boston. Their students, then, lose the opportunity for greater exposure to teachers of different races. Viewed from a broader perspective than a single system lawsuit, proportional representation employment remedies hoist integrationists on their own petard. To question the merits of striving for proportional racial or ethnic representation in a teacher corps is not to deny that race, ethnic (or gender) alike role models raise student hopes and aspirations.¹¹⁴ Accepting the idea that racial and ethnic pride merits recognition in the employment process does not, however, support magnifying it out of proportion by mandating proportional representation.

114. Personal but unsystematic observations suggests there is some merit to role model arguments. There is little systematic research on the multifaceted concept, however. See, e.g., Speizer, *Role Models, Mentors and Sponsors: The Elusive Concept*, 6 SIGNS 692 (Summer 1981).

To question the merit of striving for proportional representation in a teacher corps does not entail, on the other hand, unqualified acceptance of seniority systems. For all their benefits, seniority systems nevertheless exalt longevity over individually measured competence, and thus weaken the professionalism of elementary and secondary school teaching. Where minorities are overrepresented among new, as compared to older hires, seniority-based layoffs have a disproportionately adverse impact on minority teachers, thus counteracting efforts to expose students (of all races) to a racially and ethnically diverse teaching faculty. Regretably, in both the desegregation cases discussed in this chapter, as well as in most employment discrimination litigation, policy options are cast narrowly in terms of an inevitable conflict between race and seniority.¹¹⁵ Presented, in litigation, with traditional and deeply prized, last-hired, first-fired seniority provisions, courts have failed to consider ways of diminishing their negative consequences to minorities and to the quality of an educational system. But there are policy options which, in many instances might mitigate, if not obviate the conflict between race and seniority. *Early* and *phased* retirement policies, based on voluntary incentives for older faculty to leave employment, are two. Because of the voluntary character of these policies, they do not challenge the concept of seniority-based entitlement. They can facilitate retrenchment with dignity to older faculty. They can open up opportunities for "new blood" (of all ages) to enter the system. They can serve the interest of racial justice and educational quality by opening opportunities for minorities and by protecting them against involuntary reductions in force that disregard their merit and their contributions as role models.

Voluntary existing incentives cannot guarantee that racial justice, quality, social harmony and dignity will always be served simultaneously. Much depends on the age profile of a particular teacher corps, and obviously, the extent of the financial inducements to phase down or to retire. Courts, however, could do worse than consider, in the factual context of each desegregation case, creative alternatives to the race versus seniority dilemma with which they are presented and which they have not resolved. By drawing attention to early and phased retirement policies, courts might open minds to the limitations of seniority in a society scarred by a history of discrimination, without engaging in a frontal assault on the "pervasive" system of seniority itself.

115. Thus the title of Professor Hooker's commentary on the *Boston* and *Kalamazoo* cases. Hooker, *Seniority v. Race: A Case For Both Sides in School Layoffs*, 12 EDUC. LAW REP. 617 (1983).

Cultural Bias in Special Education Assessment and Placement

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Considerable attention has been given by special educators and social scientists to the use of intelligence tests in the placement of racial and ethnic minority children into special education classes. Specifically active were: Abeson & Zettel;¹ Bateman & Herr;² Berk, Bridges & Shih;³

1. A. ABESON & J. ZETTEL, *The End of the Quiet Revolution: The Education For all Handicapped Children Act of 1974*, 44 EXCEPTIONAL CHILDREN 115-127 (1977).

2. B. BATEMAN & C. HERR, *Law and Special Education*, HANDBOOK OF SPECIAL EDUCATION (Kauffman & Hallahan eds. Prentice-Hall 1981).

3. R. BERK, W. BRIDGES & A. SHIH, *Does IQ Really Matter? A Study of the Use of IQ Scores for Tracking of the Mentally Retarded*, 48 AMERICAN SOCIOLOGICAL REVIEW 58-71 (1981). Item A: Educable Mentally Handicapped (EMH) is used by the State of Illinois in preference to Educable Mentally Retarded (EMR). Item B: The evidence came from data collected between 1973 and 1976 by Berk, Bridges, and Shih (1981), the primary thrust of which was meant to establish that IQ remained a critical causal variable in the EMH placement process. The Judge, however, interpreted the significance of the data differently than the researchers. Item C: In interpreting evaluation data, the EAHCA regulations require that each public agency draw upon information from a variety of sources, "including aptitude and achievement tests, teacher records, physical condition, social or cultural background, and adaptive behavior," 34 C.F.R. § 300.533. A footnote in the regulations explains that all these examples would be required to establish a classification of mental retardation.

Gordon & Rudert;⁴ Guterman;⁵ Macmillan & Meyers;⁶ Mercer;⁷ and Turnbull & Turnbull.⁸ Generally, advocates for minority students have charged that special education placement of racially or culturally different students on the basis of IQ scores is unfair because the tests are standardized on white, middle-class children and therefore do not accurately reflect the learning rate or potential achievement level of other groups of children. Over the past fifteen years, reliance on IQ tests for placement of minority children into special education programs has been challenged in court. As a result, use of the tests has been restricted and even enjoined.

The purpose of this chapter is threefold: (1) to review the court cases that have challenged the use of intelligence or aptitude tests as the basis for special class placement of minority children, especially placement into programs for the educable mentally retarded (EMR), (2) to analyze the two best-known recent decisions: *Larry P. v. Riles*⁹ and *PASE v. Hannon*¹⁰, and (3) to indicate which of the cultural and racial bias issues raised in the various cases may have been resolved and which continue to elude resolution, awaiting further developments.

REVIEW OF COURT CASES

A common reference point for litigation in special-education-related cases is *Brown v. Board of Education of Topeka*.¹¹ Although the case is remembered because it outlawed *de jure* racial segregation in the public schools, the implications of the decision for minority handicapped children were apparent to prophetic readers: if the equal protection clause of the fourteenth amendment could be successfully invoked to outlaw racially segregated schools, it could also be used to protect racial and cultural minorities from inappropriate segregation within a school building—either in regular education or special education programs—based upon culturally and racially biased assessment.

4. R. GORDON & E. RUDERT, *Bad News Concerning IQ Tests*, 52 SOCIOLOGY OF EDUCATION 174-190 (1979).

5. S. GUTERMAN, *IQ Tests in Research on Social Stratification: The Cross-Class Validity of the Tests and Measures of Scholastic Aptitude*, 52 SOCIOLOGY OF EDUCATION 163-173 (1979).

6. D. MACMILLAN & C. MEYERS, *The Nondiscriminatory Testing Provisions of P.L. 94-142, THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT (P.L. 94-142): ISSUES AND IMPLICATIONS* (Semmel & Heinmuller eds. 1977).

7. J. MERCER, *LABELLING THE MENTALLY RETARDED* (1973).

8. H. TURNBULL & A. TURNBULL, *FREE APPROPRIATE PUBLIC EDUCATION: LAW AND IMPLEMENTATION* (1978).

9. 343 F. Supp. 1306 (N.D. Cal. 1979).

10. No. 74 C 3586, 3 EHLR 552:108 (N.D. Ill. 1980).

11. 347 U.S. 483 (1954).

The reach of the fourteenth amendment was tested in the 1967 *Hobson v. Hansen*¹² case, which focused on misclassification and segregation of minority students. Among the issues was the suitability of the use of group-administered aptitude tests to relegate District of Columbia students to rigid educational tracks. The court held that black (and poor) children had been inappropriately placed in lower educational tracks or "blue-collar" programs with reduced academic expectations because of their poor performance on culturally biased, primarily verbal-skills tests. The tracking system was criticized by the court as contributing to the racial segregation of students, resulting in discrimination that locked most blacks into restricted school and post-school careers. The federal judge directed that the tracking system be abolished as violative of substantive due process and equal protection of the laws. Judge Skelly Wright noted:

Because these tests are standardized primarily on and are relevant to a white middle-class group of students, they produce inaccurate and misleading test scores when given to lower class and Negro students. As a result, rather than being classified according to ability to learn, these students are in reality being classified according to their socioeconomic or racial status, or—more precisely—according to environmental and psychological factors which have nothing to do with innate ability.¹³

The next major charge of biased assessment in the education placement process occurred in a California case. The plaintiffs in *Diana v. State Board of Education*¹⁴ were Mexican-American students who came from homes in which Spanish was the primary language. They had been placed in classes for the educable mentally retarded primarily on the basis of scores resulting from the administration, in English, of the Stanford-Binet or Wechsler Intelligence Scales for Children. Upon retesting using bilingual measures, seven of the nine plaintiffs scored above the IQ cutoff score for mental retardation. The plaintiffs filed a class-action suit charging that bias in the administration and use of the tests was a constitutional violation of equal protection of the laws. A 1970 settlement required that students be tested in their primary language, that Mexican-American and Chinese students in EMR classes be retested, and that children wrongly placed be given assistance to facilitate their reentry into regular classes. A follow-up stipulation in June, 1973, required the California Department of Education to oversee the elimination of the overrepresentation of Mexican-Americans

12. 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

13. *Id.* at 514.

14. No. 70-37, *stipulated settlement approved* (9th Cir. June 18, 1973) reported 3 EHLR 551:297 at note 5, lower court (N.D. Cal. 1970).

in EMR classes where the percentage of Mexican-American students significantly exceeded the percentage of Mexican-American children in the general school population.

The *Diana* case differed from *Hobson* in that the claims of biased assessment encompassed not only a racial minority (in this case Chinese) but also a cultural and ethnic minority (Mexican-American). In *Diana* the central issue was not educational tracking, but rather the focus was directly on the special education placement process. Additionally, the case revealed the failure to test in the "primary language of the home" as an important source of bias in the assessment process.

That the reach of the fourteenth amendment was extending became evident in 1972, when a class action suit was filed against the San Francisco Unified School District alleging that six black students had been wrongly placed in programs for the mentally retarded. The plaintiffs charged the inappropriate use of standardized intelligence tests that were racially and culturally biased and that ignored their home learning experiences. In the celebrated *Larry P. v. Riles*¹⁵ plaintiffs charged that such a placement procedure violated the federal Civil Rights Act of 1964 and the right to equal protection guaranteed by both the California Constitution and the fourteenth amendment to the United States Constitution. Unlike *Diana*, biased administration of the tests was not at issue, rather inherent bias in the test instruments themselves. In June, 1972, the federal district court granted a preliminary injunction against the use of IQ tests for EMR class placement. On appeal, the Court of Appeals for the Ninth Circuit upheld the preliminary injunction and enlarged the affected class to include all California black children who had been or in the future would be wrongly placed or maintained in EMR programs.

After seven years of trial proceedings, federal district judge Robert F. Peckham ordered elimination of the disproportionate enrollment of blacks in EMR classrooms and a permanent injunction on the use of standardized intelligence tests for EMR class placement of blacks. In his decision Judge Peckham established the following: (1) the evidence did not show that the fifteen-point-lower mean IQ test score of blacks was the result of genetic inferiority or could be completely explained by lower socioeconomic status; therefore, the lower scores must also reflect racial bias in the tests themselves; (2) the evidence did not validate that the biased scores identified only those blacks who could not profit from regular or remedial instruction and who met the California definition of EMR; (3) intelligence quotients were central to California's EMR placement process; (4) since the scores were both

15. See *Larry P. v. Riles*, *supra* note 9.

biased against blacks and central to placement, they contributed significantly to the disproportionate enrollment of blacks in EMR classes; and (5) the disproportionate enrollment had an impermissibly discriminatory effect on misclassified blacks, since EMR placement was "essentially permanent" and "educationally dead-end, isolating, and stigmatizing."¹⁶ The judge ruled that under the fourteenth amendment, plaintiffs had met their burden of showing that the disproportionate impact resulting from use of IQ scores revealed an impermissible intent to discriminate, even if discrimination were not the predominant intent. School officials could show no compelling state interest to justify the discriminatory intent, nor could they show that any unintended harm imposed by a denial of regular education opportunities was outweighed by a controlling state interest in providing the best possible education to its students, since the EMR program was demonstrably inappropriate for those who were not mentally retarded.

The magnitude of the *Larry P.* decision sent shock waves through the education system and left advocates for minority children hopeful that Judge Peckham's ruling was the precedent they needed to systematically put an end to intelligence testing as an EMR placement tool. However, despite its importance, *Larry P.* was not the culmination of the cultural bias issue in testing.

In 1975, *Parents in Action on Special Education (PASE) v. Hannon*¹⁷ was filed in Illinois as a class action suit alleging that intelligence tests administered by the defendant Chicago school system were culturally biased against black children who had been or would be placed in special classes for the educably mentally retarded. As with the *Larry P.* case, the suit was triggered by the disproportionate number of black children who were enrolled in EMR classes, although unlike the California school districts the Chicago School District is a predominantly black school district. In spite of the fact that the *PASE* case addressed virtually the same issue of racial bias in EMR classification and placement as did *Larry P.*, and that the plaintiffs used many of the same expert witnesses, federal district judge John F. Grady did not find for the *PASE* plaintiffs. His decision reflected an alternative judicial approach to the question of discriminatory testing. Judge Grady observed that Judge Peckham's opinion was "largely devoted to the question of what legal consequences flow from a finding of racial bias in the tests. There is relatively little analysis of the threshold question of whether test bias in fact exists. . . ."¹⁸ Judge Grady saw his job

16. *Id.*

17. *Id.* at note 10.

18. *Id.*

as addressing the threshold question differently than did Judge Peckham in the *Larry P.* decision. Since the plaintiffs' expert witnesses failed to document IQ test bias by reference to enough specific items on the tests, Judge Grady decided he would examine the three principal intelligence tests, item by item—an unusual task for a judge to assume. Using a face validity criterion, he concluded that one item on the Stanford-Binet (Form L-M) and a total of eight items on the Wechsler Intelligence Scale for Children (WISC) and the Wechsler Intelligence Scale for Children Revised (WISC-R) were culturally biased against black children. He further concluded that those few items did not render the tests unfair and would not significantly affect the score of an individual taking the test. Furthermore, Judge Grady found the IQ score was not the sole determinant of mental retardation. Therefore, he held for the defendants that "the WISC, WISC-R, and Stanford-Binet tests when used in conjunction with the statutorily mandated 'other criteria for determining an appropriate educational program for a child' . . . do not discriminate against black children in the Chicago public schools."¹⁹

AN ANALYSIS OF LARRY P. AND PASE

Until PASE previous litigation, *i.e.*, *Hobson*, *Diana*, and *Larry P.*, had provided a growing trend against the use of intelligence and aptitude tests as a means to continue racial and ethnic minority segregation within the public school system. Thus, did the PASE decision represent an end to this trend or even a reversal? And, why did Judges Peckham and Grady come to such divergent conclusions on essentially the same issue when the circumstances of the two cases appeared to be so similar? Several possibilities emerge.

First, as previously suggested, each judge viewed the statistical and psychometric evidence of cultural bias differently. Judge Peckham believed that it substantiated the view that the tests were biased. Judge Grady did not. Their assessment of the possibility of covert rather than overt bias in psychometric testing and of the question of statistical validation of the tests differed significantly.

Second, although both judges dismissed the argument that the fifteen-point differential between the mean IQ score of blacks and whites on intelligence tests was due to genetic differences in the two races, they viewed the relative role of socioeconomic status differently. Judge Peckham accepted the evidence that socioeconomic status accounted for only part of the variance in IQ scores, and he concluded

19. *Id.*

that the remaining variance had to be caused by cultural bias in the test items themselves. Judge Grady, on the other hand, accepted the contention that poverty and cultural disadvantage produced delayed cognitive development which was sufficient to account for mean score differences. His failure to find noticeable cultural bias in the tests themselves (with the exception of the eight items cited) lent credence to this view.

Third, evidence regarding the role of IQ tests in the educational placement process differed somewhat. Unlike the *Larry P.* evidence, the *PASE* testimony demonstrated to the judge's satisfaction that IQ was not the primary criterion used in actual practice. Judge Grady noted that poor classroom performance rather than intelligence tests generated the referral process which led to full-scale assessment. He cited evidence that showed the number of children whose IQ was in the EMH range,²⁰ but were nonetheless not classified as EMH when the whole assessment process was completed.²¹ He concluded that an IQ score was only one of many factors used to produce the classification and determine an appropriate placement. In contrast, Judge Peckham found that intelligence tests triggered the classification in the *Larry P.* case and were actually the primary assessment tool—a violation of the California Education Code.

Fourth, each judge approached the issue of bias in IQ testing with different presumptions about the validity and utility of EMR classifications. Judge Peckham makes clear his belief that EMR placements are isolating, stigmatizing, educationally limiting, and essentially permanent. If a child is misplaced in such a setting, the harm is presumably irreparable. In contrast, while Judge Grady said misclassification is an educational tragedy, he nonetheless appeared to view it as correctable because he noted that significant numbers of EMH students are constantly being shifted back into the regular curriculum as they become "ready for a greater challenge."²² Such differences in perception about the placement resulting from the testing could very much affect the seriousness with which each viewed the issue of cultural and racial bias, even though the utility and validity of EMR placement was not an issue per se.

Finally, the time interval between the 1972 preliminary injunction in *Larry P.* and the *PASE* arguments had produced the passage of both Section 504 of the Rehabilitation Act of 1973 (P.L. 93-112)²³ and the

20. See *supra* note 3 at Item A.

21. *Id.* at Item B.

22. *Rowley v. Board of Educ. of Hendrick Hudson Cent. School Dist.*, 632 F.2d 945 (2d Cir. July 1980).

23. The Rehabilitation Act of 1973 (Public Law 93-112) § 504, codified at 29 U.S.C. § 794. Final regulations at 34 C.F.R. § 104.

Education for All Handicapped Children Act of 1975 (P.L. 94-142),²⁴ followed by the issuance of federal regulations to assure satisfactory implementation of an appropriate education to handicapped children. Both the 504 and EAHCA regulations, in compliance with statutory objectives, attempted to protect children from being misclassified and subsequently misplaced in special education programs. Reflecting particularly the *Hobson*, *Diana*, and *Larry P.* concerns, the regulations stated that materials and procedures were to be selected and administered in such a way as to be culturally and racially non-discriminatory. Specifically, tests were: (a) to be administered in the child's native language or mode of communication, (b) to be multifaceted, *i.e.*, no single procedure was to be the sole criterion for determining what the appropriate program was to be,²⁵ and (c) to be validated for the specific purpose for which they were used. The 504 and EAHCA regulations further required that testing be administered by trained personnel and that the evaluation be carried out by a multidisciplinary team rather than by a single examiner. The test instruments themselves were to assess relevant areas of educational need and were to reflect the child's abilities accurately rather than merely reflecting the impairment. Finally, test reevaluations were mandated every three years under EAHCA and "periodically" under Section 504, to avoid the problem of attaching a permanent label which might become inappropriate over time.

Given this set of federal regulatory safeguards, to which the Chicago School Board cited adherence, it is possible that Judge Grady was more prepared to believe the Chicago claims of nonbiased assessment than was Judge Peckham to believe the earlier claims of California's implementation of state and federal requirements. The assessment process, of which IQ testing is just a part, was viewed in its late 1970s context by Judge Grady, whereas Judge Peckham viewed it in a context of what he saw as historically-rooted intransigence.

Although the *PASE* decision conflicts with *Larry P.* and may appear to reverse the trend of earlier decisions, it can be seen in another light as a vindication of many of the earlier concerns. Despite disagreement over to what extent IQ tests are culturally and racially discriminatory, the *PASE* case may stand for the proposition that the use of IQ tests for EMR placement without sufficient regard for other data (*e.g.*, classroom performance, parental input, personal-social skills), and without regard to their methods of administration and interpretation is

24. The Education for All Handicapped Children Act of 1975 (Public Law 94-142), codified at 20 U.S.C. § 1401. Final Regulations at 34 C.F.R. § 300.

25. See *supra* note 3 at Item C.

likely to be discriminatory and violative of due process. Viewed in this light even the *PASE* decision furthers the concept of nonbiased assessment championed by its predecessors.

REMAINING ISSUES

While the legislative enactments and regulatory provision of Section 504 and EAHCA attempt to protect minority children from misclassification, it remains for the educational establishment to assume responsibility for implementation of the legislative and regulatory standards and to give practical meaning to those general requirements. As Macmillan and Meyers (1977) have aptly pointed out, it is easier to determine what constitutes discriminatory testing (*e.g.*, administration of IQ tests in English to a Spanish-speaking child) than to ascertain what constitutes nondiscriminatory testing. While the process that is spelled out in statutory and regulatory language suggests the general requirements of nondiscriminatory testing, the particular criteria are not specified and may continue to be tested in the courts. For instance, Section 504 and EAHCA do not establish how three key aspects of nondiscriminatory assessment are to be measured: (1) how cultural bias in test instruments is to be recognized, (2) what constitutes "trained" personnel, and (3) how one is to determine whether a test is valid for the purposes for which it is used.

The *PASE* case can be viewed as a judicial attempt to suggest answers to the first two questions. The judge, in effect, said that cultural bias can be recognized using the superficial criterion of face validity. In contrast, Judge Peckham in *Larry P.* was more willing to acknowledge the possibility that subtle language differences could depress scores across all test items and thereby constitute a form of cultural bias in the tests. Since testing psychologists do not agree as to how cultural bias is to be recognized or eliminated, it is somewhat ironic that the courts are asked to decide what testing experts cannot. In addition, the fact that the IQ scores followed rather than preceded referral for EMH placement and were weighed along with other assessment results was viewed by Judge Grady as evidence that bias from a single instrument would be cancelled out by other factors in the assessment process. However, another judge might wish to ascertain if there were bias in the other factors (*e.g.*, adaptive behavior scales, achievement tests) as well.

Judge Grady also decided that the personnel in the Chicago schools were sufficiently "trained" when he noted that the assessment team was likely to include someone from the child's racial background and that psychological examiners held master's degrees and additionally

had passed theoretical and practical tests administered or educators might require different lengths of time for training, while others might simply require a different kind of training.

Finally, the issue of the validity of IQ tests as a classification tool for mild mental retardation among blacks was sidestepped by Judge Grady since what was at issue was whether the use of such tests invalidated the overall assessment process. However, Judge Peckham found that the validity of IQ tests for use in identification of black EMR students was important to establish. The question of whether tests are valid for the purposes for which they are used is extremely technical, again defying consensus among psychological testing experts, let alone judges. At present it remains unclear how this issue will be illuminated in the courts.

A LOOK AT THE FUTURE

There has been widespread interest in the *PASE* and *Larry P.* decisions, and persons with conflicting viewpoints about cultural bias in IQ tests have hoped that the ruling they supported would be definitive. However, the authors believe that both *Larry P.* and *PASE* are but benchmarks in the continuing evolution of court rulings. Initially, each decision was appealed, and each could have been overturned by a higher court. Now, although the *Larry P.* case is continuing on appeal, the *PASE* appeal has been dropped because the Chicago School District agreed to a moratorium on IQ testing for EMH placement purposes. So, although the conflicting rulings stand, the current practices in the two jurisdictions are similar. But, given the continuing disproportionate enrollments of ethnic and racial minorities in EMR classrooms across the country, and the unresolved questions indicated above, one can expect continuing challenges to special education assessment procedures and, perhaps, on increasingly technical issues. If the Section 504 and EAHCA regulations are eventually weakened in the wake of deregulatory and decentralization efforts in Washington, D.C., education will have no less a need to assure procedural and substantive due process to its handicapped students. Even if bureaucratic standards become less specific, students still have a civil right to be protected from misclassification, which is an issue of constitutional proportions, involving the claims of denial of equal protection of the laws and of due process. Litigation which previously could have been brought on statutory or regulatory grounds will, if necessary, shift back to constitutional grounds. Though harder to pursue because constitutional violations are harder to prove than statutory violations, the attempt to refine and delineate the use and misuse of intelligence tests can be expected to continue regardless of statutory or regulatory changes.

Role of Public Relations in Preventive School Law

PAUL D. KEMP

Paul D. Kemp, administrative assistant to the Superintendent, Office of School/Community Relations, is celebrating his 16th year in education. As head of the Office of School/Community Relations, he is in charge of all community relations for the school district. He supervises the community education adult education and volunteer services departments, as well as serving as Public Information Officer. Dr. Kemp received his doctorate in School Administration from Nova University in Fort Lauderdale, Florida.

The eyes of the nation are now focused on education. In addition to the Commission on Excellence's report, "Nation at Risk," there are twenty-four other major reports either already published, or will be soon. Most of them point out areas of concern and offer remediation suggestions. We acknowledge that we do have problems and we need all the assistance we can get. Let's look at some of the concerns we must face in education today.

Declining public school enrollments, diminishing number of public school parents and steadily increasing numbers of adults with no school age children combine to become "partly responsible for a decreasing public confidence in education," according to education pollster Ned S. Hubbell of the Michigan State Board of Education.

Hubbell's report of trends in citizens' attitudes toward education in the decade of the 70s are the result of more than 100 opinion polls conducted by his own former Michigan-based polling firm for school districts throughout the nation.

Demographic data in each of ten successive Gallup polls support Hubbell's findings. Ten years ago, 44 percent of the adults in this country had children in public schools. In 1980, the U.S. Census showed only 28 percent were public school parents and better than two out of three adults had no children of school age.

By 1990, the U.S. Census Bureau projects the number of people age 55 and over will be larger than the entire K-12 school population. And, if present trends continue, one out of every five Americans will be at least 55 by the turn of the century.

Unfortunately, as this phenomenon has developed, educators, by-and-large, have failed to see the importance of expanding their information networks beyond a dwindling circle of parents and friends.

As educators, we resent the implications of reports, like "Nation at Risk," that imply that we have allowed academics to slide. Perhaps we've had different goals such as access for all students in the last decade. We agree that we need now to refocus or prioritize academics. But, remember, it was only about a decade ago that James Meredith was trying to gain access in the University of Mississippi. A friend of mine was a high school principal in the northwest during that same era. A couple came to enroll a handicapped child in my friends' building. They were told the school was very sorry but they did not have a suitable facility or program for an impaired child. Look where we are today!

For non-parents, the mass media continue to be the primary source, with word-of-mouth from other people moving into second place this year. The other three major sources of information for non-parents are someone's children, school district publications, and teachers and other school employees.

The news media, which, as Hubbell shows, more and more of our publics are depending on for information about schools, carry information about these topics critically or not at all. But, if you look closely at this coverage, you will find they do so more often from lack of information from school administrators than from lack of space or interest from readers.

Schools must become pro-active, devise marketing plans and public relations programs if they are to survive.

Until fairly recently, schools shunned the idea of PR; it was tied too closely to business, competition, profits. We didn't need to sell ourselves. But realistically, today with 70-75 percent of our community no longer having children in public schools, we must let the taxpayers know what is going on, and value of education to the life of the community.

Citizens have become disgruntled and somewhat dissatisfied with bureaucracy, big government, taxes. They don't feel they carry much weight at the national level or even the state. But they can go to the polls in their local schools and vote against a mill election.

We must sell our constituency:

- (a) Education is better than ever!
- (b) Better educated young people make a better community for all of us.
- (c) Someone paid the bills when we attended a school.

- (d) Education is not just kindergarten thru 12th grade—but life-long, and we can help!
- (e) Public education is the backbone of democracy.
- (f) We must be “partners” we-schools-community-you, to survive!

What does all of this have to do with the legal type? We, too, must be partners. A better informed, involved, linked community will have fewer legal problems. There are many ways you can assist as a partner:

1. Be sure your school board has clear, concise board policies to administer their schools.
2. Are the administration's regulations on how policies will be administered, clear?
3. Are policies cross-referenced with school law?
4. Last, but certainly not least, as a partner, provide detailed in-service for school staffs. Don't wait until the school administration calls you with a problem, be proactive. When a law is passed, when a court case is settled and there are legal ramifications—tell the schools about it. Let them know before they face the issue.

A recent article in *Urban Magazine* spoke of volunteers aiding cities. One example was an attorney who took time from his San Francisco law firm to try misdemeanor cases for the District attorney. Schools need you, too! Get involved!

We have a common problem in Public Relations, getting the story of what we do to the public, becoming more credible. Media, as information service, doesn't do much for image of attorneys or image of educators. The 1982 Gallup Poll placed constituents' confidence as: (1) Medicine—45%, Scientific community—38%, and Educational community—33%. These lead: organized religion, military, Supreme Court, banks and credit unions, major companies, Ronald Reagan & Co., news media, Congress, organized labor, advertising, and lawyers.

You are problem solvers, trained to be critical thinkers. What would you think if I called three or four and asked you to help me think through a problem? We are like the ghetto—we have our own language—our way of doing things. We often think of ourselves as the experts but we don't know much about you. Your jargon—your way of doing things.

We are only experts in education—you are experts in law. We could learn from each other.